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No. 82-

In the

Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL RAY POWERS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1. Whether the application of the Indiana policy of non-disclosure of the identity of confidential informants violated Petitioner's rights accorded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution, to have evidence derived from illegal wiretaps suppressed.

2. Whether the introduction into evidence at Petitioner's trial of evidence derived from an illegal interception of Petitioner's telephone conversations violated Petitioner's rights accorded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934 and the Fourth and Fourteenth Amendments to the United States Constitution.

3. Whether the Indiana Supreme Court's decision that the discovery after trial that evidence admitted at Petitioner's trial was derived from an illegal interception of Petitioner's telephone conversations does not require a new trial because probable cause for a search warrant is determined at the time of issuance of the warrant is repugnant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934 and the Fourth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The petitioner Russell Ray Powers respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Indiana entered in this proceeding on October 21, 1982, rehearing denied January 3, 1983.

OPINIONS BELOW

The decision of the Supreme Court of Indiana is reported at 440 N.E.2d 1096, and reprinted at App. A at A-1. The Supreme Court's Order denying rehearing without opinion is reprinted at App. B at A-23.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on October 21, 1982, affirming Petitioner's conviction. The Supreme Court of Indiana denied without opinion a timely filed Petition For Rehearing on January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved on this Petition for Certiorari:

Article VI.

* * * *

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> Amendment XIV, Section 1...No State shall...deprive any person of life, liberty, or property, without due process of law...

* * * *

The relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520—the Wire Interception and Interception of Oral Communications sections—are reprinted *infra* at App. C at A-24.

The following provision of the Federal Communications Act of 1934, c. 652, Title VI, §605, 48 Stat. 1103, *as amended* 47 U.S.C. §605 (1968), is involved on this Petition for Certiorari:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, subtance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

STATEMENT OF THE CASE

On March 14, 1979, Officer Donald J. Croft of the Jeffersonville, Indiana Police Department, prepared and filed an affidavit requesting a search warrant for the residence of Petitioner, Russell Powers [hereinafter "Powers"]. In his affidavit, Croft alleged that a confidential informant had advised him that Powers was a dealer of cocaine and that a quantity of the substance had been seen at Powers' residence the preceding evening. Upon the issuance of a search warrant, Officer Croft and other law enforcement officers searched Powers' residence, seized cocaine and other substances, and arrested Powers. An Information was filed two days later charging Powers with dealing in a narcotic drug, dealing in a Schedule II Controlled Substance, and dealing in a Schedule IV Controlled Substance. [Rec. 10].

Powers' trial attorney filed a "Motion To Suppress Evidence" (App. D at A-30) seeking suppression of all evidence seized pursuant to and derived from the search warrant issued in the case. Relying upon the Fourth and Fourteenth Amendments to the United States Constitution, Powers argued in his Motion that Officer Croft's affidavit was not supported by probable cause.

The trial court held an evidentiary hearing to consider Powers' Motion To Suppress Evidence, at which Officer Croft testified. [Rec. 245]. Powers' trial attorney attempted to question Officer Croft as to the identity of his confidential informant, arguing to the Court that if Croft were forced to identify his informant, he would reveal that his informant was Connie Hartman, who worked for a telephone answering service employed by Powers. The trial court sustained objections by the State to all questions requiring disclosure of the identity of Croft's informant. Powers' counsel then made an offer to prove that if Officer Croft were permitted to answer his questions, Croft would

testify that Connie Hartman was his informant and that in her capacity as an agent of the police she intercepted Powers' telephone conversations and disclosed to Officer Croft the contents thereof, which information was the substance contained in Croft's search warrant affidavit. [Rec. 284-299].

Other than Officer Croft's denial that he had any knowledge that any of the information contained in his affidavit had been derived from an interception of telephone conversations, there was no evidence presented at the pre-trial supression hearing to establish the source of Croft's information or whether it had, in fact, been derived from illegal wiretaps.

At the conclusion of the pre-trial hearing, it was agreed that the Court would take the Motion under advisement and that the parties would submit memoranda on the relevant issues. In his "Brief In Support of Defendant's Motion To Suppress Evidence", Powers argued that the trial court erred in refusing to order the State to disclose the identity of its confidential informant. Relying upon this Court's decision in *Roviaro v. United States*, 353 U.S. 53 (1957), Powers argued that the government's privilege to keep confidential its informant's identity must be balanced against the individual's right to prepare his defense. Powers argued in his brief that as a matter of public policy neither law enforcement officers nor the informant should be permitted to use the privilege to conceal the informant's contravention of federal wiretap statutes.

Citing the exclusionary rule provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520 [hereinafter "Title III"] and the Federal Communications Act of 1934, 47 U.S.C. §605 [hereinafter "§605"] Powers argued that if the facts contained in the affidavit for a search warrant were derived from the illegal interception of Powers' telephone

conversations with third parties, all evidence seized pursuant to the search warrant must be suppressed.

The trial court overruled Powers's Motion To Suppress Evidence with neither a memorandum opinion nor any explanation on the record for its ruling. [Rec. 107]. During the trial of Powers, the State offered into evidence thirty-nine (39) exhibits, all of which were items seized pursuant to the challenged search warrant. [Rec. 456-457, 636-637, 741]. Powers objected to the admissibility of each item, asserting *inter alia* as grounds therefor that the exhibits were the product of an illegal search, and incorporating in his objection his brief in support of his motion to suppress evidence, all testimony that was offered at the supression hearing, and a supplemental affidavit previously filed with the Court by Powers in which he delineated his factual basis for believing that Officer Croft's allegations in the affidavit for a search warrant were derived from Connie Hartman's intercepting his telephone conversations with third parties. [Rec. 457-464, 637-638, 742]. Powers' objections were overruled, again without any statement of reasons or written opinion by the trial court, and each exhibit was admitted into evidence. [Rec. 464, 640, 743]. Immediately prior to the commencement of the trial, the State made an oral *motion in limine* requesting that the trial court order defense counsel to make no mention of the confidential informant during the course of the trial. Argument was heard outside the presence of the jury and the Court granted the motion. [Rec. 304-313].

The jury returned verdicts finding Powers guilty as charged on all three counts in the Information [Rec. 119] and Powers was subsequently sentenced to thirty (30) years in prison for dealing in a narcotic drug, ten (10) years in prison for dealing in a Schedule II Controlled Substance, and five (5) years in prison for dealing in a Schedule IV Controlled Substance, with the sentences to be served consecutively. [Rec. 151-152].

After the trial and sentencing, Connie Hartman wrote letters to the judge and called the judge, prosecutor and

defense counsel to confess her illegal interception of telephone conversations held between Powers and third parties. [Rec. 843]. Upon request for an evidentiary hearing by Powers, the Court issued a subpoena to Ms. Hartman, who was the sole witness at the hearing. She testified that she was an employee of Ezell's Answering Service, which was the telephone answering service used by Powers. [Rec. 816]. She testified further that at the request of Officer Croft, she had listened in on telephone conversations of Powers and relayed what she heard to Officer Croft [Rec. 833]. She described for the Court her procedure for eavesdropping on Powers' telephone conversations:

> "Okay, the way that the switchboard is set up, when the phone rings you plug into it. And like I said, several times Russell or whoever was at the house would come in behind and say, 'I have the phone now.' Which if you pull the plug halfway they get a click like you have hung up but you can still hear the conversation but they don't know that you're on there listening."

[Rec. 832]

Ms. Hartman testified that when Officer Croft had first contacted her, she had been reluctant to give him any information because she did not want Mr. Powers to know whether or not she was the informant. She said that Officer Croft advised her not to worry, that he would talk to the prosecutor and would not have to reveal her identity. [Rec. 839]. Immediately before the search warrant affidavit was filed, when Croft again contacted her, and she again voiced her concern, Croft told her "I have made up several things on the search warrant to throw Russell off so he won't know who it is." [Rec. 839] She testified that Officer Croft told her specifically that statements in the affidavit that on eight occasions his informant had called him and given him information had been "made up so that Russell will never know" who the informant is." [Rec. 839-840]. (Croft's search warrant affidavit is set out verbatim in the decision of the Supreme Court of Indiana. App. A at A-3-5.)

On cross-examination, Ms. Hartman acknowledged that she had been at Powers' residence several months prior to the time that the affidavit for a search warrant was filed by Officer Croft and that she had seen a machine used to package cocaine and had been present when Powers cut cocaine and had observed Powers use cocaine at his residence. [Rec. 846-848] However, she added that she had not been in the residence for several months except for one occasion at which time she did not see any drugs. [Rec. 851, 864] She specifically denied that the information in Croft's affidavit stating that his informant had been in Powers' residence the night before the search and had seen Powers and others pooling their money to go out of state to purchase cocaine had not been provided by her. [Rec. 856-57] She did, however, talk with Officer Croft that day and advise him that Powers was going out of town. [Rec. 857]

Following the post-trial hearing, Powers filed a Belated Motion To Correct Errors, citing *inter alia* as errors of the Court, the Court's order preventing Powers from discovering the identity of Croft's confidential informant, the Court's overruling of his Motion To Suppress Evidence and overruling objection to the admissibility of seized evidence at trial. [Rec. 2-6] The trial court, again without any written opinion, overruled Powers' Belated Motion To Correct Errors. [Rec. 215]

On appeal to the Supreme Court of Indiana, Powers asserted seven errors, four of which raised the federal questions presented in this Petition For Certiorari. In his first argument, Powers asserted that the trial court's overruling his Motion To Suppress Evidence and his objections to the introduction of evidence seized pursuant to the search warrant violated the Fourth Amendment to the United States Constitution, the Federal Communications Act of 1934, 47 U.S.C. §605, and Title III of the Omnibus Crime Control and Safe Streets Act of Powers devoted over twenty pages of his appellate brief to the argument on these three issues, relying extensively upon the numerous decisions of this Court construing the federal wiretap legislation and the applicability of the Fourth and

Fourteenth Amendments to the United States Constitution to the interception of wire communications.

The decision of the Supreme Court of Indiana on the issue of whether the trial court erred in overruling Powers' objections to the admissibility of evidence seized pursuant to the search warrant was predicated in part on an implied construction of both federal statutes and the Fourth and Fourteenth Amendments to the United States Constitution. The Court reasoned as follows:

> Assuming, *arguendo*, that Connie Hartman was telling the truth at the post-conviction hearing, that she did indeed intercept Appellant's telephone calls, we fail to see how this would result in a new trial. The timing of her testimony is crucial here. If Hartman had testified at the suppression hearing and at that point convinced the trial court of her allegations, the search warrant would have been invalid due to the illegal information contained therein. The removal of the illegally obtained information would have eliminated the probable cause in the search warrant and the evidence seized would have been suppressed. The truth and veracity of her testimony at the *post-conviction* hearing, however, would not travel back and render the search warrant in valid:
>
> > "As this Court stated in *Smith v. State*, (1971) 256 Ind. 603, 271 N.E.2d 133, 136:
> >
> > > 'The test for probable cause to make an arrest is whether *at the time of the arrest* the facts and circumstances... were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee has committed or was committing an offense. *Beck v. Ohio*, (1964) 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142.'
> >
> > Emphasis added. *See Gaddis v. State*, (1977) 267 Ind. 100, 368 N.E.2d 244. Thus, whether probable cause existed for the arrest is determined by examining the facts and

> circumstances as they were known to be at the time of the arrest."
>
> *Riggenbach v. State*, (1979) ___ Ind. ___, ___, 397 N.E. 2d 953, 954-55.
>
> Although the above cited case dealt with probable cause for arrest, we feel the rationale is similar for probable cause in issuing a search warrant. The facts known to Officer Croft at the time the search warrant was issued indicated that illegal activity was taking place in Appellant's house. That some of the underlying circumstances may be shown later after trial to be illegally obtained does not change the fact that probable cause existed for the search and subsequent arrest. No error has been shown.

App. A at A-9-10. The Court neither analyzed the language of the two federal wiretap statutes nor examined the numerous decisions by this Court interpreting those statutes, in arriving at its conclusion that the discovery *after* trial that the evidence was the fruit of an illegal wiretap does not require a new trial and supression of the evidence, whereas discovery of the illegality *before* trial does require suppression.

A second basis for the Indiana Supreme Court's rejection of Powers' claim that the evidence presented at trial should have been suppressed pursuant to Title III, and Section 605 and the Fourth and Fourteenth Amendments to the United States Constitution, was that Powers had not proven that the post-trial evidence of Connie Hartman could not have been discovered before trial with the exercise of due diligence, and therefore did not constitute "newly discovered evidence." App. A at A-8-9. In Powers' Petition for Rehearing, Powers contended that the Court's decision placed him in a classic "Catch-22". If the State is not required to divulge whether Connie Hartman was the *only* informant, Powers cannot prove that Croft's allegations in his search warrant affidavit were either deliberate lies or information obtained from Connie Hartman, which she

had obtained from illegal interceptions of Powers' telephone conversations. Unless the State is ordered to disclose the identity of its informant, Powers cannot prove that Hartman was even *an* informant relied upon by Croft. The Indiana Court's decision thus establishes an impossible test for Powers to meet.

The second and related issue raised by Powers on appeal was whether the trial court erred in refusing to order the State to disclose the identity of its confidential informant. In his appellate brief, Powers argued that the Indiana policy and general rule that the identity of a confidential informant who merely supplies probable cause for making an arrest or search and who was not an active participant in the crime need not be disclosed to the defense, must give way to Powers' right to disclosure of the identity of the confidential informant where disclosure is essential to establish that the evidence introduced by the State at trial was derived from an illegal wiretap by the State's confidential informant.

The Supreme Court of Indiana ruled "...the burden is upon the defendant seeking disclosure to demonstrate exception to the privilege that the informer remain anonymous." App. A at A-10. Finding that Connie Hartman's post-trial testimony contained inconsistencies, the Court found that it did not "necessarily appear that Hartman's testimony would have been relevant and helpful in preparing Appellant's defense nor essential to a fair determination of the case." App. A at A-11. The Court also found that the defense could have issued a subpoena to Hartman as a defense witness at the pre-trial suppression hearing or at trial, or could have deposed her, and any arguable infirmities in the affidavit could have been presented to the trial court. App. A at A-11.

REASONS FOR GRANTING THE WRIT

The questions presented by this petition are substantial and warrant the attention of this Court for the following reasons: (1) the applicability of the Indiana policy of non-

disclosure of the identity of confidential informants to the facts of this case raises an important question of federal law which has not been, but should be, decided by this Court; and (2) the decision of the Supreme Court of Indiana that evidence derived from an illegal interception of Petitioner's telephone conversations was admissible at Petitioner's trial because the source of the evidence was not discovered until after trial is in conflict with applicable decisions of this Court and federal statutory law.

1. Important Undecided Question of Federal Law

Title III and §605 accord to persons whose telephone conversations have been illegally intercepted the right to suppression of the contents of intercepted conversations and all evidence derived therefrom.[1] The exclusionary rule provisions of these federal statutes are applicable to both federal and state criminal proceedings.[2] This Court has held that the Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, requires that all evidence seized or derived from an illegal search be suppressed.[3]

Prior to trial, Powers moved to suppress all items seized at his residence, and a comment made by him to police

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[1] Title III provides this right in §2518(10), reprinted in Appendix C at A-29 §605, reprinted *infra* at 3-4, has been interpreted by this Court to entitle an aggrieved person to suppression of evidence. *See infra* at 20-22. For similar decisions interpreting §2518 (10), *see infra* at 18-19.

[2] *Id.* The State of Indiana has never disputed in either the trial court or on appeal to the Supreme Court of Indiana that Title III and §605 are applicable to Indiana state criminal proceedings.

[3] *Mapp v. Ohio*, 367 U.S. 643 (1961). The Court held in *Mapp* "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Court extended the exclusionary rule to evidence which is the fruit of an illegal search. Subsequent decisions have applied the "fruit of the poisonous tree" doctrine to state court proceedings. *See generally Johnson v. Louisiana*, 406 U.S. 356 (1972); *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *Taylor v. Alabama*, U.S. , 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982). For decisions of this Court holding that the Fourth Amendment requires suppression of evidence derived from illegal wiretaps, *see infra* at 23.

following his arrest, because all of the evidence was seized pursuant to a search warrant which was based on an affidavit of probable cause containing information derived from a confidential informant's interception of Powers' telephone conversations with third persons.[4] Powers' attorney attempted to question the police officer who signed the affidavit about the identity of his informant, but the prosecutor objected arguing that under Indiana law the informant's identity need not be disclosed. The trial court sustained the objection by the prosecutor.

Powers' counsel then made an offer to prove that Connie Hartman, an employee of a telephone answering service used by Powers, was the officer's informant and that information supplied by her, which was included in the affidavit for the search warrant, was derived from illegally intercepting Powers' telephone conversations with third parties. *Infra* at 5.

The trial court denied Powers' motion to suppress and overruled his objections at trial to each challenged exhibit. After trial, Connie Hartman came forward, identified herself as Officer Croft's informant, and confessed to intercepting Powers' telephone conversations with third parties and providing the contents thereof to Officer Croft. Hartman was the only witness at the post-trial hearing; her testimony that she intercepted Powers' telephone conversations was unrefuted.

Having established that Ms. Hartman had illegally intercepted Powers' telephone conversations[5], Powers

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[4] Powers' Motion To Suppress Evidence, App. D at A-30, relied upon general Fourth and Fourteenth Amendment principles. The specific claims raised in this petition were raised at the pre-trial suppression hearing, *Infra* at 5-6, and in Petitioner's Brief In Support Of Motion To Suppress Evidence, and on appeal to the Supreme Court of Indiana.

[5] Title III, §2511 prohibits any willful interception of wire communications, unless the person committing the interception has a wiretap warrant issued pursuant to the Act, consent of one of the parties

(footnote continued on following page)

again sought disclosure of the identity of Officer Croft's confidential informant.[6] Without disclosure of the identity of the informant relied upon by Croft, Powers was unable to prove that Connie Hartman was *the* informant and that the facts contained in Croft's search warrant affidavit came from Hartman's interception of Powers' telephone conversations and not from some other source. The trail court denied the motion.

The Supreme Court of Indiana premised its rejection of Powers' argument that illegally seized evidence was admitted into evidence at his trail on Powers' failure to prove his allegations at the hearing on his motion to suppress evidence. App. A at A-6. Yet it then affirmed the trial court's ruling that the identity of Croft's informant need not be disclosed, thereby preventing Powers from proving his allegations. The Court relied upon the "general policy in Indiana... to prevent disclosure of an informant's identity unless the defense can demonstrate that disclosure is relevant and helpful or is necessary to a fair trial." App. A at A-10. The Court also found that Powers should have issued a subpoena to Hartman to testify at the suppression hearing or should have deposed her and "any arguable infirmities in the affidavit could have been presented to the trial court. App. A at A-11.

Since the trial court had already ruled that Powers would be prohibited from discovering the identity of Croft's informant, it is unclear what value, if any, there would have been in having Hartman testify at the suppression hearing. Even if she had testified before trial, as she had after the trial, that she illegally intercepted Powers' telephone

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[5] (Continued)

to the conversation, or is a party to the conversation. A further exception in provided by §2511(2)(a)(i), authorizing an operator of a switchboard to intercept wire communications for "mechanical or service quality control checks." Although Connie Hartman may fall within the definition of an "operator of a switchboard," there is no contention by her or the State that her interception of Powers' telephone calls was inadvertent and during a "mechanical or service quality control check."

[6] *Infra* at 8.

conversations and divulged the contents thereof to Officer Croft, Powers could not prove that the factual allegations contained in Croft's affidavit had been obtained from Hartman unless Croft was ordered to reveal whether Hartman was not only an informant, but his *only* informant. The Court's prohibition of disclosure of the identity of Croft's informant also prevented Powers from proving that Croft had included deliberate lies in the affidavit to conceal Hartman's identity, as she testified that he had told her he would do.[7]

The practical effect of the Indiana Supreme Court's decision is that Powers has been deprived of the only evidence available to prove that Officer Croft deliberately lied in his search warrant affidavit, and that the other factual allegations contained in the affidavit were too stale to establish probable cause for the issuance of a search warrant or were derived from Hartman's illegal interception of Powers' telephone conversations.

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[7] *Infra* at 7. If Croft had been ordered to reveal whether Connie Hartman was his only informant and whether all of the facts contained in his affidavit came from her, the trial court could have then ruled upon Powers' argument that the evidence must be suppressed because Croft intentionally included false statements in the affidavit to conceal Hartman's identity.

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court established the test for suppression of evidence seized pursuant to an affidavit containing false statements:

> We reverse and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegations of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Powers could meet his burden of proof only if Croft was ordered to disclose the identity of his informant.

This Court has construed and interpreted Title III and §605 on several occasions; but, it has never decided whether a state may so strictly enforce a policy of non-disclosure of the identity of confidential informants that it thereby deprives a person of the protections and rights accorded by the federal statutes. Powers does not suggest that the mere unsubstantiated allegation that evidence was derived from an illegal interception of his telephone conversations requires disclosure of the identity of the police informant. Rather, he argues that where an alleged informant testifies that she has illegally intercepted telephone conversations of the defendant and divulged the contents thereof to the police officer who prepared the search warrant affidavit, or where the alleged informant has testified that the police officer who prepared the search warrant affidavit told her that he included deliberate lies in the affidavit to conceal her identity, the state policy of non-disclosure must give way to the defendant's rights to disclosure of the informant's identity. The Indiana Supreme Court's ruling to the contrary renders Title III, §605 and the Fourth Amendment null and void whenever the illegal wiretap is committed by a confidential informant—even when the informant admits under oath the illegality.

Although the precise federal question raised by Petitioner has not been previously decided by this Court, numerous decisions interpreting Title III, §605 and the Fourth and Fourteenth Amendments strongly suggest that this Court would reach a different conclusion than did the Supreme Court of Indiana. Indeed, a different result is mandated by the statutes and constitutional provisions.

In *Gelbard v. United States*, 408 U.S. 41 (1972), the Court, relying both on the unequivocal language of §2515 of Title III and the clear congressional intent[8] that the statute be

[8] In determining whether Indiana's policy is in conflict with the federal statutes, an examination of the congressional intent underlying the legislation is essential. This Court carefully and thoroughly traced the legislative history in *Gelbard, supra*, 408 U.S. 47-50:

(footnote continued on following page)

[8] (Continued)

The unequivocal language of §2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information:

> "To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused." §801(d), 82 Stat. 211.

The Senate committee report that accompanied Title III underscores the congressional policy:

> "Title III has as it dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause." S.Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968); U.S. Code Cong. & Admin. News, p. 2153.

Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern. Indeed, the congressional findings articulate clearly the intent to utilize the evidentiary prohibition of §2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:

> "In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and *the use of the contents thereof in evidence in courts and administrative proceedings.*" §801(b), 82 Stat. 211 (emphasis added).

And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means of §2515, of the limitations upon invasions of individual privacy:

(footnote continued on following page)

strictly enforced, held that grand jury witnesses were entitled to invoke the statutory prohibition against use before the grand jury of evidence derived from interception of any wire or oral communication as a defense to charges of civil contempt brought on the basis of their refusal to obey court orders to testify before the grand jury. The Court found that §2515 also ensures the integrity of the judiciary:

> "Moreover, §2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that §2515 bars in unquivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents."
> (footnote omitted)

Gelbard, supra, 408 U.S. at 51.

Two years later, in *United States v. Giordano*, 416 U.S. 505 (1974), the Court held that Title III authorized only the Attorney General or a specially designated assistant attorney general to request a wiretap order, and that where

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[8] (Continued)

> "Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. . . .Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation." S.Rep.No. 1097, *supra*, at 69; U.S. Code Cong. & Admin. News, p. 2156 (emphasis added.)

evidence established that it was an executive assistant to the Attorney General who approved the request, all evidence derived from the wiretap must be suppressed.[9] The Court reached this conclusion despite the fact that the Attorney General himself had authorized an application for an extension of the wiretap order.

Giordano is particularly important to this case because of its analogous facts. At a pre-trial suppression hearing, Giordano's attorney questioned government agents and discovered that it was an executive assistant rather than a person authorized by Title III who approved the request. Had the government asserted executive privilege or some other basis for retaining the confidentiality of its approval process, Giordano would have been rendered powerless in his attempt to prove that Title III had been violated. That is the precise result in the case of Powers.

In such circumstances, any state policy of non-disclosure of the identity of a confidential informant must yield to the defendant's right to disclosure. As the Fifth Circuit Court of Appeals held in *United States v. Fox*, 455 F.2d 131 (5th Cir. 1972):

> We believe it self-evident that if a defendant has the right to examine these officials in regard to a connection, no matter how tenuous, he must have the right to find out who the appropriate officials are. Only the government knows who committed these secret, illegal acts; who had access to the information; and to what use the illegally-obtained information was put. The right to know the identity of these officials is the most significant when the intercept logs on their face show no arguable relevance or connection. It is in just such a case that the government will fail to call the officials to the witness stand and thus prevent the

[9] In a companion case, the Court held that where the Attorney General had personally approved the request and the application for the warrant incorrectly stated that the Assistant Attorney General approved it, §2515 does not require suppression of the evidence. *United States v. Chavez*, 416 U.S. 562 (1974).

defendant from examinating them in any manner on how the surveillance fruits were actually used.

Interpretations by this Court of §605 also suggest that the decision of the Indiana Supreme Court is incorrect. In *Nardone v. United States*, 302 U.S. 379 (1937) [hereinafter referred to as Nardone I], the Supreme Court held that §605 required suppression of evidence obtained by law enforcement officers from the interception of the defendant's telephone conversations. After retrial and a second conviction, the case again reached the Supreme Court. This time, the issue was whether §605 also required suppression of evidence derived from the illegal wiretap, or whether it was limited to the overheard conversation itself. The Court held that to "forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destruction of personal liberty.' What was said in a different context in Silverthorn Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319, 24 A.L.R. 1426, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.'" *Nardone v. United States*, 308 U.S. 338 (1939) [hereinafter referred to as *Nardone II*].

The statutory exclusionary rule provisions of §605 were applied to use of an extension phone in *Lee v. Florida*, 392 U.S. 378 (1968), where police had obtained a party line with the same number as that of the defendant. Police then installed a tap directly into the wall to avoid "the telltale 'click' that would otherwise have warned conversing parties that someone else on the line had picked up a receiver." 392 U.S. at 379. This procedure was similar to the technique used by Connie Hartman; she inserted the switchboard plug half way to avoid any warning "click" but enough that she could hear the entire conversation. [Rec. 832]. The fact that §605 applies with equal force to private persons who violate the law as it does to law enforcement officers is emphasized by Justice Stewart in *Lee:*

Section 605 was enacted as part of the Federal Communications Act of 1934, 48 Stat. 1103, six years after the Court had said in Olmstead v. United States, 277 U.S. 438, 465, 48 S.Ct. 564, 568, 72 L.Ed. 944, that "congress may of course [legislate to] protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence * * *." In Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314, the Court was first called upon to decide whether §605 had indeed served to render evidence of intercepted communications inadmissible in a federal trial. In that case the Government urged that "a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime." 302 U.S., at 383, 58 S.Ct. at 277. In reversing the judgment of conviction, the Court's answer to that argument was unequivocal:

> "[T]he plain words of section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person.'* To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments.
>
> * * * * * *
>
> "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed practices and procedures violative of [and] inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved the Congress to adopt section 605 as evoked the guaranty against privacy, embodied in the Fourth and Fifth Amendments of the Constitution. 302 U.S. at 382, 383, 58 S.Ct. at 276.

[Emphasis in original].

392 U.S. at 382-383.

The Supreme Court's reasoning in cases interpreting §605 is almost identical to those enforcing Title III. In *Lee*, the Court opined that "...no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound * * *.'" 392 U.S. at 386, quoting Art. VI, United States Constitution. *See, Elkins v. United States*, 364 U.S. 206 (1960). The Court has emphasized that no law enforcement officer has ever been prosecuted for violating §605; therefore, "nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law 'in the only effectively available way—by removing the incentive to disregard it." *Lee v. Florida, supra*, 392 U.S. at 387, quoting in part *Elkins v. United States, supra*, 364 U.S. at 217.

The procedures required to determine if evidence is derived from a wiretap in violation of §605 are much the same as those required by Title III:

> ...The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Nardone II, supra, 308 U.S. at 341. Powers was unable to prove to the trial court that his rights were violated—not because he neglected to try, but because the court shielded the police from disclosing the identity of the confidential informant. The above-quoted language, cited by Powers at p. 65 of his Appellant's Brief filed in the Supreme Court of Indiana, was totally disregarded by the Court in its decision.

Decisions of this Court interpreting the Fourth and Fourteenth Amendments also suggest that this Court would decide the federal question presented here differently than it was decided by the Supreme Court of Indiana.

As with the federal wiretap statutes, the Fourth Amendment requires suppression, not only of the overheard conversation, but of any evidence derived from it. *Alderman v. United States*, 394 U.S. 165 (1969). *See Katz v. United States*, 389 U.S. 347 (1967). The issue for the trial is "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Alderman v. United States, supra*, 394 U.S. at 180, quoting *Wong Sun v. United States*, 371 U.S. 471, 478 (1963). *See also, Nardone II*, 308 U.S. at 341. The government has "the ultimate burden of persuasion to show that its evidence is untainted." *Alderman v. United States, supra*, 394 U.S. at 183.

In *Alderman*, the Supreme Court relied on *Nardone II* for the mandatory procedures to be followed by trial courts in determining whether the government's evidence is derived from an illegal interception of telephone communications. The three-step process for Title III and §605 is the same for the Fourth Amendment. First, the defendant has the burden of going forward with specific evidence demonstrating the taint. Second, the court must give the defendant an opportunity to prove a substantial portion of the case against him is the fruit of the poisonous tree. Finally, the government has the burden to prove its evidence is free of taint. 394 U.S. at 183.

At the pre-trial suppression hearing, Powers alleged by his affidavit [Rec. 93] and by a formal offer to prove that the informant of the police who supplied information for the search warrant was Connie Hartman, and that her information had been obtained by an unlawful interception of his telephone calls. [Rec. 284-287] The trial court failed to

afford him an opportunity to prove these allegations, because it refused to order disclosure of the identity of the confidential informant. The court's order thus prevented the defense from meeting its burden of proof *before* trial.

If the decision of the Supreme Court of Indiana is permitted to stand, it will be a signal to law enforcement officers throughout Indiana, and perhaps the country, that they can successfully circumvent Title III, §605 and the Fourth Amendment by having confidential informants do their wiretapping for them. In one opinion, the Supreme Court of Indiana has effectively abolished two federal statutes and a half-century of constitutional law relating to wiretapping.

2. Conflict With Decisions of this Court and Federal Statutes

The Supreme Court of Indiana held that even if Connie Hartman's post-trial testimony is true and information derived from her illegal interception of Powers' telephone conversations was included in the search warrant affidavit, a new trial would not be required because probable cause for issuance of a search warrant must be determined at the time the warrant is issued:

> Assuming, *arguendo*, that Connie Hartman was telling the truth at the post-trial hearing, that she did indeed intercept Appellant's telephone calls, we fail to see how this would result in a new trial. The timing of her testimony is crucial here. If Hartman had testified at the suppression hearing and at that point convinced the trial court of her allegations, the search warrant would have been invalid due to the illegal information contained therein. The removal of the illegally obtained information would have eliminated the probable cause in the search warrant and the evidence seized would have been suppressed. The truth and veracity of her testimony at the *post-conviction* hearing, however, would not travel back and render the search warrant invalid:
>
> "As this Court stated in *Smith v. State*, (1971) 256 Ind. 603, 271 N.E.2d 133, 136:

> 'The test for probable cause to make an arrest is whether *at the time of the arrest* the facts and circumstances. . . were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee had committed or was committing an offense. *Beck v. Ohio*, (1964) 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142.'
>
> Emphasis added. *See Gaddis v. State*, (1977) 267 Ind. 100, 368 N.E.2d 244. Thus, whether probable cause existed for the arrest is determined by examining the facts and circumstances as they were known to be at the time of the arrest."

Riggenbach v. State, (1979) ___ Ind. ___, ___, 397 N.E.2d 953, 954-55.

> Although the above cited case dealt with probable cause for arrest, we feel the rationale is similar for probable cause in issuing a search warrant. The facts known to Officer Croft at the time the search warrant was issued indicated that illegal activity was taking place in Appellant's house. That some of the underlying circumstances may be shown later after trial to be illegally obtained does not change the fact that probable cause existed for the search and subsequent arrest. No error has been shown.

App. A at A-9. The above-quoted holding is repugnant to the unquivocal language of Title III, §2518(10)(a) authorizing an aggrevied person to file a motion to suppress evidence. That section provides, *in pertinent part*:

> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

App. C at A-29. The statute thus specifically authorizes Powers to move after the trial for a new trial and suppression of the evidence derived from the illegal wiretap. The Indiana Supreme Court's *"hear no evil, see no evil"* analysis threatens to undermine the strict mandates of

Title III that neither the contents of intercepted wire communications nor any evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding. Title III, §2515. App. C at A-28.

This Court has consistently held that both Title III[10] and §605[11] require suppression unless the strict requirements of the statutes have been satisfied. While none of these decisions has involved post-trial challenges to the evidence, the Court has been relentless in its enforcement of the statutes. Where a criminal defendant has been precluded from proving before trial that the evidence seized is subject to suppression, holding that the defendant cannot prove the illegality of the evidence after trial would directly contravene Title III, §605 and the Fourth Amendment.

Moreover, Powers maintains that since he established at the post-trial evidentiary hearing the facts contained in the search warrant affidavit were derived from an illegal interception of his telephone conversations, the burden shifted to the State to prove an independent basis for the facts or to prove that Connie Hartman was not the informant. Having failed to present any evidence whatsoever, the State did not meet its burden and Powers was entitled to a new trial, at which all evidence derived from the illegal interception of his telephone conversations would be suppressed. The decision of the Indiana Supreme Court to the contrary is in direct conflict with the holdings of each of the decisions cited hereinabove, which clearly require suppression of the evidence.

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[10] *United States v. Giordano, supra; Gelbard v. United States.*

[11] *Nardone v. United States*, 302 U.S. 379 (1937); *Nardone v. United States*, 308 U.S. 338 (1939); *Lee v. Florida*, 392 U.S. 378 (1968).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana.

Respectfully submitted,

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APPENDIX A

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IN THE

Supreme Court of Indiana

RUSSELL RAY POWERS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 481 S 108
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge

PIVARNIK, J.

Appellant-defendant, Russell Ray Powers, was convicted of dealing in a narcotic drug, Ind. Code §35-48-4-1 (Burns Repl. 1979), dealing in a schedule II controlled substance, Ind. Code §35-48-4-2 (Burns Repl. 1979), and dealing in a schedule IV controlled substance, Ind. Code §35-48-4-3 (Burns Repl. 1979), at the conclusion of a jury trial in Clark

Circuit Court on April 29, 1980. Appellant was given thirty (30) years imprisonment for Count I, ten (10) years imprisonment for Count II, and five (5) years imprisonment for Count III, all sentences to be served consecutively. Powers now appeals.

Appellant raises seven errors on appeal, concerning: 1) whether the search warrant was based upon illegally intercepted telephone conversations; 2) whether the trial court erred in allowing the State to retain the confidentiality of its informant; 3) whether the trial court erred in overruling Appellant's Belated Motion to Correct Errors based on newly discovered evidence; 4) whether the search warrant was facially inadequate; 5) whether the trial court erred in admitting exhibits over Appellant's chain of custody objection; 6) whether the trial court erred in allowing a police officer to testify as to Appellant's intent to deliver drugs; and 7) whether the sentence imposed was was excessive.

On March 14, 1979, a search warrant was issued authorizing the police to search for narcotics in the residence located at 801 E. Chestnut Street in Jeffersonville, Indiana. Officers Donald Croft and Ray Leezer were on surveillance at 801 E. Chestnut on March 15, 1979, when Appellant arrived at the house. Appellant was accompanied by two individuals, a man and a woman. After the three got out of the car, Appellant removed two dark colored satchels and entered the house. A few minutes later, Appellant left the house, made some purchases at a liquor store and a grocery store, and then returned to his home at 801 E. Chestnut. At that point the police informed him of the search warrant and Appellant agreed to let the police search his residence. As they approved the front door, one of the officers observed a young man grap a briefcase or bag and run through the house. The police forced the door open and caught the young man, Terry Powers, and seated him, along with Appellant, a woman named Rhonda Spears, and a young child, on a bed while the house was searched. The search turned up cocaine, diazepam, barbiturates, phentermine, and some marijuana.

In addition, mannitol, which is used to cut cocaine, was also found, along with various sifters and other tools.

I

Appellant argues that the search warrant was based on information illegally obtained through the interception of his telephone calls. He now argues that this fact makes the search and seizure of items at his home illegal and therefore the trial court should have suppressed the introduction of all evidence seized at Appellant's residence. Appellant's error 3 is related to error 1 and both errors will be handled in this issue.

Officer Donald Croft was the affiant for the search warrant and the following reasons constituted his belief that there was probable cause to search Appellant's house:

> "I am a police officer with the Jeffersonville Police Department. Approximately three months ago a person contacted me for the purposes of giving me information concerning the possession and sale of cocaine. This person or informant related to me that the person of RUSSELL POWERS who lives in the above described dwelling was a regular dealer in cocaine. This informant further related to me that RUSSELL POWERS was observed by the informant cutting cocaine in the above described dwelling on a number of occasions and further advised me that RUSSELL POWERS was observed by the informant selling cocaine to persons who visted at the above described dwelling. This informant additionally related that RUSSELL POWERS would cut this cocaine and bag it in plastic bags using a seal-a-meal machine which seals material in plastic bags. I advised this person, my informant, to keep me notified as to the activity of RUSSELL POWERS. Over the last three months on at least eight occasions this informant gave me information concerning the activity of RUSSELL POWERS. This information consisted of this informant telling me that RUSSELL POWERS intended to go to a certain place and meet with a certain person for the purposes of transacting a

deal in cocaine. On these occasions I and other police officers provided surveillance of RUSSELL POWERS and he did go to the places indicated by this particular informant and on several of these occasions I did observe him meeting with the person described by the informant. I was not able on these occasions to make any interceptions or determine that drug trafficking was occurring.

This informant advised me on a number of occasions that RUSSELL POWERS would go to Bowling Green, Kentucky, for the purpose of purchasing cocaine. This informant additionally advised me that on the occasions that RUSSELL POWERS was observed cutting the cocaine that he referred to it as cocaine.

Last evening, March 13, 1979, I was observing the above described dwelling and noted that there were six automobiles parked outside the dwelling and that these automobiles had Kentucky plates. I also observed a number of people inside the dwelling. Early this morning, March 14, 1979, I contacted my informant and inquired as to the people being at 801 E. Chestnut Street and as to the automobiles parked outside. This informant advised me that RUSSELL POWERS was present in the dwelling with a number of people who were pooling their money for the purpose of having RUSSELL POWERS purchase a large amount of cocaine. This informant related that there were conversations concerning the purchase of cocaine and this information related that money was given to RUSSELL POWERS for the purpose of his purchasing cocaine.

Following this conversation with my informant I received a telephone call from the informant later on and the informant related that RUSSELL POWERS made a statement that he was going to Bowling Green to make the connection and that he had left for the apparent purposes of traveling to Bowling Green.

This informant further related that last night cocaine was observed by the informant in the above described dwelling and that none of the persons left

the dwelling last night with this cocaine. Furthermore, this informant stated that based upon past observations cocaine was always to be found in the above dwelling.

I discussed this matter further with this informant who related that following his trips to Bowling Green that RUSSELL POWERS would return to the above described dwelling taking the cocaine inside for the purposes of cutting it before delivering it or selling it to his various customers.

I asked this informant how the informant was certain that the materials RUSSELL POWERS dealt in was cocaine. This informant related that in addition to the numerous conversations in which the word cocaine was used and in addition to seeing the white powdery substance in plastic bags that RUSSELL POWERS snorted the white powder in this informant's presence and that the white powder had some obvious effect upon him.

I believe this informant to be a credible person who spoke with personal knowledge as to the informant's observations in that on at least eight occasions, as mentioned above, the information given to me by this informant proved to be accurate and correct.

Based upon the foregoing, I believe there is probable cause to search said dwelling for cocaine." (emphasis added)

A hearing on the suppression motion was held on August 27, 1979. Croft was questioned mainly by the defense counsel, although a few questions were asked by the State. Under questioning, Croft testified that all of the facts in the affidavit were true to his knowledge. He stated that he did not know of any illegal interception of phone calls and that he never directed the informant to make any illegal interceptions. Defense counsel asked Croft who the informant was but the State successfully objected, arguing that the confidentiality of the informant must be maintained. A few notes that Croft wrote down were introduced at which time he was asked to explain the term "calls often." Croft replied that the information he wrote

down on that note pad came from another informant but he assumed that "calls often" meant telephone calls. At the end of the hearing defense counsel made an offer to prove that Connie Hartman was the informant. The trial court reserved judgment on the motion until both sides had an opportunity to submit briefs in support of their positions. The Motion to Suppress was denied on December 7, 1980.

Appellant cites us to 18 U.S.C. §2515 (1970) which provides as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Appellant argues that Connie Hartman listened in on his private telephone calls while she worked for a telephone answering service to which Appellant subscribed. This information was passed on to Officer Croft and was used by him to determine the probable cause for searching Appellant's house. Therefore, Appellant states that §2515 compels any court to refuse the introduction into evidence of all items seized during the search.

We feel that Appellant failed to prove this contention at the hearing on the motion to suppress. The underlined portions of the search warrant affidavit indicates that the informant personally observed the illegal transactions at Appellant's residence and did not receive that information through illegal interception of telephone calls. It may be possible that the information concerning the eight occasions when the informant knew where Appellant was going and who he was meeting was obtained by listening in on telephone calls but this speculation was apparently insufficient to convince the trial court of any illegality. Officer Croft stated that he did not know of any illegal

interceptions nor did he authorize any interceptions. While Appellant made an offer to prove that Connie Hartman was the informant, he never introduced her at the hearing. Appellant apparently made no effort to subpoena Hartman or depose her prior to the hearing or the trial. In fact, during the hearing on the Belated Motion to Correct Errors, Hartman stated that she was never approached prior to or during the trial by Appellant or anyone else. The burden of showing that the information in the search warrant affidavit was the product or fruit of illegal police activity lay with Appellant. *See Maciejack v. State*, (1980) ___ Ind. ___, 404 N.E.2d 7. From the evidence presented at the hearing, the trial court properly overruled the motion to suppress all evidence seized at Appellant's house.

After the trial was concluded and Appellant was convicted and sentenced to prison, a hearing on Appellant's Belated Motion to Correct Errors was held on August 21, 1980. Connie Hartman, the alleged informant, was the only witness to testify at the hearing. Basically, Hartman told the trial court that she was the secret informant, that she did illegally intercept Appellant's telephone conversations, and that Officer Croft told her he would make up statements in the affidavit of the search warrant in order to protect her identity. Her testimony was not without some discrepancies but Appellant urges us to consider this "newly discovered" evidence and to hold that the trial court erred in refusing to grant a new trial. We disagree.

We held in *Bryant v. State*, (1979) ___ Ind. ___, ___, 385 N.E.2d 415, 421:

> "To justify the granting of a new trial on the basis of newly discovered evidence, the petitioner or appellant must show:
>
> '. . .(1) that the evidence has been discovered since the trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is

> worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.' *Tungate v. State*, (1958) 238 Ind. 48, 54-55, 147 N.E.2d 232, 235-36. *See e.g. Clark v. State*, Ind., 378 N.E.2d 850; *Jackson v. State*, (1975) 264 Ind. 54, 339 N.E.2d 557; and *Emerson v. State*, (1972) 259 Ind. 399, 287 N.E.2d 867."

Granting a new trial on ground of newly discovered evidence is within the discretion of the trial court and this Court will not disturb the ruling unless there is an abuse of discretion. *Smith v. State*, (1982) ___ Ind. ___, 429 N.E.2d 956; *Washington v. State*, (1979) ___ Ind. ___, 390 N.E.2d 983.

Without examining all of the nine *Tungate* requisites, it is obvious that Appellant has failed the sixth requirement, that of showing the use of due diligence to discover the evidence in time for trial. Ind. R. Tr. P 59(A)(6) permits a new trial for "[n]ewly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial." Therefore, under *Tungate* and Rule 59(A)(6) a new trial may be denied where the appellant cannot show that even with reasonable diligence the new evidence could not be produced at trial. The record reveals that Appellant was arrested on March 15, 1979. At the suppression hearing on August 27, Appellant made an offer to prove that Connie Hartman was the confidential informant. On April 22, 1980, Appellant's trial began and was concluded on April 29 when the jury returned verdicts of guilty. Connie Hartman testified at the hearing on Belated Motion to Correct Errors that prior to Appellant's trial and during the trial neither Appellant nor defense counsel approached her in any manner to question her about her role as the informant. Thus, nearly eight months passed from the suppression hearing to the start of the trial without any effort by Appellant to secure testimony from Connie Hartman, even though Appellant alleged that she was the secret informant and that she had been involved in illegal activity. There was no abuse of discretion in denying a new trial.

Assuming, *arguendo*, that Connie Hartman was telling the truth at the post-conviction hearing, that she did indeed intercept Appellant's telephone calls, we fail to see how this would result in a new trial. The timing of her testimony is crucial here. If Hartman had testified at the suppression hearing and at that point convinced the trial court of her allegations, the search warrant would have been invalid due to the illegal information contained therein. The removal of the illegally obtained information would have eliminated the probable cause in the search warrant and the evidence seized would have been suppressed. The truth and veracity of her testimony at the *post-conviction* hearing, however, would not travel back and render the search warrant invalid:

> "As this Court stated in *Smith v. State*, (1971) 256 Ind. 603, 271 N.E.2d 133, 136:
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> > 'The test for probable cause to make an arrest is whether *at the time of the arrest* the facts and circumstances...were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee had committed or was committing an offense. *Beck v. Ohio*, (1964) 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142.'
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> > Emphasis added. *See Gaddis v. State*, (1977) 267 Ind. 100, 368 N.E.2d 244. Thus, whether probable cause existed for the arrest is determined by examining the facts and circumstances as they were known to be at the time of the arrest."

Riggenbach v. State, (1979) ___ Ind. ___, ___, 397 N.E.2d 953, 954-55.

Although the above cited case dealt with probable cause for arrest, we feel the rationale is similar for probable cause in issuing a search warrant. The facts known to Officer Croft at the time the search warrant was issued indicated that illegal activity was taking place in Appellant's house. That some of the underlying circumstances may be shown later after trial to be illegally obtained does not change the fact that probable cause

existed for the search and subsequent arrest. No error has been shown.

II

Appellant claims that the trial court erred in refusing to disclose the identity of Officer Croft's informant. He feels that her identity was crucial to the attack on the search warrant for the suppression of evidence as noted above in Issue I. Appellant argues that had the informant's identity been disclosed, the trial court would have been bound by federal statutes to suppress the evidence resulting from the search warrant.

The general policy in Indiana is to prevent disclosure of an informant's identity unless the defense can demonstrate that disclosure is relevant and helpful or is necessary to a fair trial. *Ryan v. State*, ___ Ind. ___, 431 N.E.2d 115; *Lewandowski v. State*, (1979) ___ Ind. ___, 389 N.E.2d 706. Since the State has the privilege to withhold the identity of an informer, the burden is upon the defendant seeking disclosure to demonstrate exception to the privilege that the informer remain anonymous. *Lewandowski, supra.*

The informant was never called as a witness at trial. The only involvement of the informant was the information given to the police which formed part of the basis for the search warrant. Appellant's argument presupposes that Connie Hartman would have testified that her information was obtained through illegal eavesdropping. As was indicated above, relevant portions of the affidavit concerning the cocaine indicated that the information was obtained through personal observation. In addition, Connie Hartman's testimony under oath at the hearing was full of inconsistencies. For example, at one point Hartman stated she saw cocaine in Appellant's residence on only one occasion but later she stated she saw cocaine on more than one occasion. Another time Hartman stated she gave Croft information that Appellant was going to meet someone on only one instance. She was later asked how many times she

reported to Croft that Appellant was going to meet someone at a certain place and her answer was that it probably would have been more than three or four times. Still later, Hartman said she never reported him leaving to meet someone at a certain location but said only that he was going out of town to a certain place. It does not necessarily appear that Hartman's testimony would have been relevant and helpful in preparing Appellant's defense nor essential to a fair determination of the case. Appellant has failed to meet his burden of demonstrating the need for disclosure.

Furthermore, the defense strongly suspected Hartman was the informant. Had the Appellant wished to pursue this theory, he could have issued a subpoena for Hartman as a defense witness at the suppression hearing or the trial. At the very least, he could have deposed her and any arguable infirmities in the affidavit could have been presented to the trial court. There is no error here.

III

Appellant claims that the search warrant was facially inadequate to meet statutory and case law requirements. Specifically, Appellant states that the affidavit failed to state sufficient facts upon which a judicial officer could determine that the confidential informant was reliable.

The statutory requirements for such affidavits are set forth in Ind. Code §35-1-6-2(a) (Burns Repl. 1979) which provides as follows:

> "Affidavit-Contents and form-Sworn testimony in lieu of or in addition to affidavit.—(a) Except as provided in subsection (c) of this section, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to

be arrested committed said offense, and setting forth the facts then in knowledge of the affiant or information based on credible hearsay, constituting the probable cause. When based on hearsay, the affidavit shall contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is factual basis for the information furnished."

In *McClain v. state*, (1980) ___ Ind. ___, ___, 410 N.E.2d 1297, 1301-02, we discussed the factors that must be met before a search warrant may be issued by a magistrate:

"Under the Fourth Amendment a determination of probable cause is required to be made by a judge before a search warrant may be issued. Such a determination may be made upon affidavit or sworn oral statement. To be sufficient the affidavit or testimony must provide a substantial basis for the judge to find that probable cause exists to believe that the proposed search will result in a discovery of evidence of an offense. *Aguilar v. Texas*, (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. In making this finding inferences may be drawn by the judge from the facts stated. *Giordenello v. United States*, (1958) 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503. If the basis, be it affidavit or actual testimony, does not provide a sufficient basis for the finding of probable cause, the evidence obtained through the warrant is inadmissible at appellant's trial. *Aguilar, supra. Riddle v. State*, (1971) 257 Ind. 501, 275 N.E.2d 788; *Callender v. State*, (1922) 193 Ind. 91, 138 N.E. 817.

An affidavit for search warrant may be sufficient although it is based upon hearsay, i.e., the maker may include information provided by others of which he has no first-hand knowledge so long as the issuing authority is provided the following information:

'(a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein.

(b) The facts within the personal knowledge of the credible person.

(c) The facts within the affiant's knowledge as to the credibility of the credible person.' *Madden v. State*, (1975) 263 Ind. 223, 226, 328 N.E.2d 727."

The affidavit is found in Issue I. There, Officer Croft related that the informant spoke with personal knowledge from having viewed cocaine in the residence the previous night and from having observed Appellant selling cocaine there on other occasions. The informant also saw Appellant cutting cocaine and sealing it in plastic bags. At these times, Appellant referred to the white substance as cocaine and snorted it in the informant's presence. This personal and first-hand knowledge satisfies the first two requirements of *Madden, supra.*

The remaining need is to determine whether the third requirement of *Madden* is met. Croft stated that on eight prior occasions the informant told him that Appellant would go to certain places and meet with certain people. The police put a surveillance on Appellant and found that he did go to the places indicated and did meet with the people described by the informant. The affiant was unable to determine if illegal activity was taking place at these meetings but nevertheless, the information was accurate and correct. Croft stated at the end of the affidavit: "I believe this informant to be a credible person who spoke with personal knowledge as to the informant's observations in that on at least eight occasions, as mentioned above, the information given to me by this informant proved to be accurate and correct."

It is well established that a statement in an affidavit declaring that the informant has previously supplied valid information is sufficient to satisfy the statutory requirement of facts as to the credibility of the informant. *Tinnin v. State*, (1981) ___ Ind. ___, 416 N.E.2d 116; *Foxall v. State*, (1973) 157 Ind.App. 19, 298 N.E.2d 470. Appellant argues that this information establishing the credibility of the informant is analogous to the "tip" in *Bowles v. State*, (1971) 256 Ind. 27, 267 N.E.2d 56, where we held that the tip alone was insufficient to establish the

necessary credibility. We held as such because the tip in *Bowles* was not supported by either history of reliability of source or extrinsic facts either from the informer or other proper sources. In this cause there were at least eight occasions where the informant provided the police with accurate information. Thus, the statement that the informant had previously provided valid information was sufficient. There has been no error shown here.

IV

When the cocaine and other drugs were removed from Appellant's home, they were taken to the Jeffersonville Police Department's property room and Officers Roberts and Croft bagged and marked the items that night. When the officers were finished the next morning, the items were placed in a safe to which only the Chief of Police and his assistant had the combination. Four days later, March 20, 1979, the Chief of Police opened the safe with Roberts and Croft present, and all the evidence was intact. Croft and Roberts took the items to the Indiana State Police Laboratory where the items were handed over the chemist George Smith. After running five different testes, Smith found cocaine in each of the samples. He sealed the items in a plastic bag and handed it over to the police on March 28. Since it was late in the evening and the Chief of Police was not around, the evidence bag was placed in a lock-up cabinet and the next morning was transferred to the safe. At that time the evidence bag was still sealed at the top. On the Friday prior to the trial, Exhibit 11 was missing seventeen bags of cocaine and Exhibit 17, which originally contained one large bag and six small packets, was missing four of the small packets. Appellant objected to the admission of all exhibits, claiming there was an insufficient chain of custody shown.

Appellant specifically argues that the missing evidence indicates that other people had the combination to the safe and therefore all of the exhibits could have been tampered with before they were moved to the laboratory for examination. We disagree. Appellant objected on chain of

custody grounds but we held in *Graham v. State*, (1970) 253 Ind. 525, 255 N.E.2d 652, that the State can introduce the laboratory's findings upon producing records or testimony showing the "continuous whereabouts of the exhibit at least between the time it came into their possession until it was laboratory tested to determine its composition." *Id.* at 531, 255 N.E.2d at 655. A proper chain of custody was shown at the trial. As for Appellant's other contention, nothing in the record indicates that the exhibits were tampered with prior to testing and this Court will not speculate about such events upon review. There is no error here.

V

During the trial Officer Croft testified about the amount of narcotics that were found in the Appellant's house. Over objection by defense counsel, Croft stated that in his opinion the drugs were possessed for delivery and not for personal use. Appellant argues that the witness' opinion of intent is inadmissible because whether or not Appellant intended to deal in narcotics was a determination that the jury must make.

The old rule that a witness may not given an opinion of an ultimate fact question has been abrogated in Indiana. *Shelby v. State*, (1981) ___ Ind. ___, ___, 428 N.E.2d 1241, 1243; *Woods v. State*, (1978) 267 Ind. 581, 582, 372 N.E.2d 178, 178. The trial court in its discretion may permit such opinion evidence in an appropriate case; accordingly, this Court will reverse such an exercise of discretion only upon a showing of abuse. *Id.* Witnesses have given opinions on whether a person is intoxicated, *Wofford v. State*, (1979) ___ Ind. ___, 394 N.E.2d 100, whether the defendant made true statements to the police, *Porter v. State*, (1979) ___ Ind. ___, 391 N.E.2d 801, whether the defendant appreciated the wrongfulness of his conduct, *Bobbitt v. State*, (1977) 266 Ind. 164, 361 N.E.2d 1193, and whether a child had been abused, *Ball v. State*, (1980) ___ Ind.App. ___, 406 N.E.2d 305.

We do not find reversible error here. As the prosecution

stated in response to defense counsel's objection, Officer Croft had investigated numerous drug cases and therefore he had enough experience to give an opinion on whether or not the drugs were held for sale or for personal use. The large amount of drugs found in the house, plus the sifters and other tools, indicated that the drugs would be prepared for sale. The jury would then weigh Officer Croft's opinion before ultimately deciding the question. There was no abuse of discretion in allowing the testimony of Officer Croft.

VI

Appellant was convicted of three counts of dealing in controlled substances. Count I was a Class A felony and Appellant was given the presumptive penalty of thirty years in prison. Count II was a Class B felony and Appellant was given the presumptive penalty for that offense, ten years in prison. Count III was a Class C felony and Appellant was given the presumptive penalty of five years in prison. The trial court ordered the three sentences to be served consecutively. Appellant argues on appeal that the forty-five year prison term is excessive and unreasonable.

Our applicable rule covering appellate review of sentences states that this Court will not "revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. R. App. Rev. Sen. 2(1). This Court has also held that when the trial court increases or decreases the sentence imposed by law, or orders the sentences to be served consecutively, the record should disclose the factors considered by the trial court to constitute aggravating or mitigating circumstances. *Gardner v. State*, (1979) ___ Ind. ___, ___, 388 N.E.2d 513, 517.

The trial judge, however, ordered that the sentences be served consecutively while also stating that he found no aggravating or mitigating circumstances which would "out-weigh imposition of the normal sentence." The

imposition of consecutive sentences conflicts with the mandate of *Gardner* and thereby constitutes error in sentencing. Therefore, we remand this cause to the trial court with instructions to impose concurrent, not consecutive sentences.

This cause remanded to the trial court with instructions to amend the sentencing; in all other respects, the judgment of the trial court is affirmed.

Givan, C.J., DeBruler, and Hunter, JJ., concur.
Prentice, J., concurs in result with separate opinion.

IN THE

Supreme Court of Indiana

RUSSELL RAY POWERS	)	
	)	
Appellant (Defendant below)	)	
	)	
v.	)	No. 481 S 108
	)	
STATE OF INDIANA	)	
	)	
Appellee (Plaintiff Below)	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge

PRENTICE, J.—Concurring in Result

I am unable to join the majority opinion upon Issue V.

As characterized by the majority, Officer Croft related his opinion that Defendant possessed the contraband recovered for purposes of selling or delivering it. From his entire testimony, I conclude that he was testifying hypothetically. Croft was asked, "* * *, do you have an opinion as to whether or not these drugs were sold or were possessed solely for personal possession or whether they were possessed for delivery or sale?", whereupon Defendant's objection was argued and overruled. Croft then testified as follows:

> "Q. In your opinion were these, was this amount of drugs possessed for personal use or for delivery to others?
>
> "A. It was possessed for sale.
>
> "Q. I also direct you to State's Exhibits #4, which has previously been identified as drugs containing amobarbital and secobarbital, based upon your

experience would this amount of drugs be possessed for personal use or for delivery to others?

"A. For sale, for delivery.

"Q. State's Exhibit #5 and State's Exhibit #15, based upon the amount, these have previously been described as valium tablets containing diazpam, based upon your experience and knowledge would this amount of drugs be held for personal use or for delivery or sale?

"A. Delivery and sale on those."

I do not comprehend the State's questions, as a whole, as inviting the Officer's opinion about whether Defendant entertained the requisite intent to sell, an ultimate fact in this case, although the first question could be so interpreted. Prior to his giving the testimony at issue, the State attempted to qualify Croft as an expert on the investigation of narcotics cases and, in so doing, disclosed the extent of his training and knowledge about controlled substances, particularly cocaine. Having educated the jury as to his expertise, the State then sought to convey an "expert's" opinion upon whether, in general, one would possess a quantity of contraband, such as that recovered, for sale. *See Thompson v. State*, (1980) Ind. App., 400 N.E. 2d 1151, 1153.

If the record revealed what the majority claims it reveals, it would show a clear abuse of discretion. In *Simpson v. State*, (1978) 269 Ind. 495, 502, 381 N.E. 2d 1229, 1233, we stated:

"It appears from the record that the psychologist in question would have testified that appellant lacked the requisite intent because of his great fear of Ben Rodriguez. The question of a person's intent at the time of the commission of a crime, not related to an issue of insanity, is a question of fact for the jury and not a proper subject of expertise. The psychologist's testimony in this regard would have been nothing more than hearsay and was not necessary as an aid for

the jury's determination of the issue of the presence or absence of criminal intent."

The State devotes a considerable portion of its argument to convincing us that Croft was qualified as an expert; however, it does not treat the issue of whether an expert's testimony was necessary in order to arrive at the opinion that Croft expressed. Even if qualified as an expert on narcotics investigations, Croft was no more capable than were the jurors themselves to infer Defendant's intent to sell from the single circumstance of possession of a large quantity of contraband.

> "As a general rule, the opinion of experts is not received 'if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding." (citation omitted)."
>
> *Keifer v. State*, (1927) 199 Ind. 10, 14, 154 N.E. 870, 871.

To allow Croft to relate the opinion that the majority claims he related, would invade the province of the jury. *See Reburn v. State*, (1981) Ind., 421 N.E. 2d 604, 606 (defense phychologist may not offer an opinion about whether the facts are consistent with an accidental shooting); *Ashbaugh v. State*, (1980) Ind., 400 N.E. 2d 767, 773 (defense psychiatrists are not qualified to offer an opinion upon the issue of self defense); *LeFlore v. State*, (1972) 258 Ind. 458, 462, 281 N.E. 2d 876, 878 (police officer, even if qualified as an expert, may not give an opinion about whether fingerprints are the best evidence that a person held an object); *Green v. State*, (1900) 154 Ind. 655, 57 N.E. 637, 640 (opinion about the quantity and quality of moonlight at the scene of a Murder is not a subject for expert testimony). *See also Matter of Perrello*, (1979) Ind., 386 N.E. 2d 174, 179 (testimony by experts concerning what constitutes the practice of law held properly excluded as invading the province of the trier of fact).

The majority either overlooks or ignores the clear impact

of the above cited cases by resorting to an oversimplified premise. These cases demonstrate that the old rule that a witness may not give an opinion upon an ultimate fact question has not been completely abrogated in Indiana. A witness still may not offer an opinion, expert or otherwise, upon an ultimate issue of fact, where the witness is in no better position than the jury to draw the inferences. That is to say that when the evidence, upon which the witness formed his opinion, is available to the jury, its position is equal of that of the witness and its opinion should be formed from the evidence free of the taint of the witness' opinion.

In a case where an ultimate issue of fact is the defendant's intent to achieve a specific unlawful result, such as the sale of a large quantity of narcotics in his possession, the circumstance of that possession does not change between the time the police officer recovers the narcotics and the time of the trial. The same cannot be said of the cases cited by the majority. The symptoms of intoxication usually disappear entirely before trial. *Wofford v. State*, (1979) Ind., 394 N.E. 2d 100, 104. The bruises and injuries of an abused child may heal before trial. *Ball v. State*, (1980) Ind., 406 N.E. 2d 305, 310. The jurors are not present during the interrogation of the Defendant; consequently, they cannot view his demeanor and other behavior reflecting upon the credibility of a confession for themselves. *Porter v. State*, (1979) Ind., 391 N.E. 2d 801, 811. Likewise, they cannot view a defendant's conduct and behavior at the time of the alleged criminal act as it may bear upon his plea of insanity. *Washington v. State*, (1979) Ind., 390 N.E. 2d 983, 988; *Bobbitt v. State*, (1977) 266 Ind. 164, 170-71, 361 N.E. 2d 1193, 1197. In sharp contrast, the jurors could weigh the fixed circumstance, in this case the quantity of narcotics recovered, and, without the aid of the opinions from others, arrive at a conclusion of their own as to Defendant's intent to deliver or to sell.

The majority's opinion upon this issue adds a mischievious and potent weapon to the State's arsenal. The testimony of a police officer, qualified as an expert, will no doubt, be given great weight. Additionally, if an

experienced narcotics investigator may opine, under oath, about a Defendant's intent to sell narcotics, should we not also allow a member of the vice squad to testify that, in his opinion, an accused knew that something he possessed was obscene, or a member of the homicide squad to testify that, in his opinion, an accused intended to commit Murder? Our jurisprudence has wisely made the determination of such issues the exclusive province of the trier of fact. See *Simpson v. State, supra.*

Nevertheless, under the circumstances of this case, I cannot find reversible error in the trial court's refusal to exclude Croft's testimony. The record contains additional substantial evidence of an intent to sell and of a thriving business. The quantity of contraband seized was quite large. The police found a gun, a clip of ammunition, a sieve, and a grinder in the black satchel, which contained some of the recovered contraband. During the search of Defendant's home the telephone rang numerous times. A police officer answered only three of the calls. During one call, the caller requested Defendant by name and inquired if Defendant had the "stuff". At the police station, while being booked, Defendant made a very inculpatory admission:

> "A. After Detective Leezer asked him with kind of job he had it was hard to believe he was into dealing drugs, he said, 'I started to get out of the coke business about a month ago.' He said, 'I wish now that I had.'"

From this evidence I conclude that the admission of Croft's testimony was error, but harmless. Consequently, I vote to affirm the judgment.

APPENDIX B

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IN THE

Supreme Court of Indiana

RUSSELL RAY POWERS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 481 S 108
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge

No. 481S108

Russell Ray Powers v. State of Indiana.

Appellants [sic] Petition for Rehearing is hereby Denied, without Opinion. Givan, C.J. All Justices Concur.

January 3, 1983

APPENDIX C

RELEVANT PROVISIONS OF TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. §2510-2520

§2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law

enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communications;

* * * *

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2)(a)(i) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) Notwithstanding any other law, communication common carriers, their officers, employees, and agents, landlords, custodians, or other persons, are

authorized to provide information, facilities, or technical assistance to persons authorized by law to intercept wire or oral communications or to conduct electronic surveillance, as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, if the common carrier, its officers, employees, or agents, landlord, custodian, or other specified person, has been provided with—

(A) a court order directing such assistance signed by the authorizing judge, or

(B) a certification in writing by a person specified in section 2518 (7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required,

setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required. No communication common carrier, officer, employee, or agent thereof, or landlord, custodian, or other specified person shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished an order or certification under this subparagraph, except as may otherwise be required by legal process and then only after prior notification to the Attorney General or to the principal prosecuting attorney of a State or any political subdivision of a State, as may be appropriate. Any violation of this subparagraph by a communication common carrier or an officer, employee, or agent thereof, shall render the carrier liable for the civil damages provided for in section 2520. No cause of action shall lie in any court against any communication common carrier, its officers, employees, or agents, landlord, custodian, or other specified person for providing information, facilities, or assistance in accordance with the terms of an order or certification under this subparagraph.

* * * *

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

* * * *

As amended Pub. L. 91-358, Title II, §211(a), 84 Stat. 654 (1970); Pub. L. 95-511, Title II, §201(a)-(c), 92 Stat. 1796, 1797 (1978).

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

* * * *

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.

* * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting,...

* * * *

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully incercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

* * * *

As amended Pub. L. 91-358, Title II, §211(b), 84 Stat. 654 (1970); Pub. L. 95-511, Title II, §201(d)-(g), 92 Stat. 1797, 1798 (1978).

APPENDIX D

STATE OF INDIANA)
) SS:
COUNTY OF CLARK)

IN THE CLARK CIRCUIT COURT
NO. 79-CR-21

STATE OF INDIANA

vs.

RUSSELL RAY POWERS

AND

TERRY THOMAS POWERS

AND

RHONDA KAY SPEARS

MOTION TO SUPPRESS EVIDENCE

Come now the Defendants, and move the Court to suppress the following evidence:

I.

All tangible evidence seized on or about the 15th day of March, 1979 at 801 Chestnut Street in the City of Jeffersonville, Indiana at approximately, ____M., from the person and residence of said Defendants including, but not limited to, seventy-eight (78) grams of a white substance in solid and powder form, two hundred sixty (260) tuinol tablets, one thousand five hundred (1500) valium tablets, thirty-eight (38) grams of white powder found in a refrigerator plus other items.

II.

All statements made and actions done by any of the Defendants, if any, at the time of and subsequent to apprehension by law enforcement officers.

III.

Testimony of law enforcement officers, their agents, and all other persons working in connection with such officers and agents, including all persons upon the premises at the time of the search, as to the alleged finding of the matters set out in Paragraph I herein.

As ground for this motion, Defendants state:

A. The arrest and apprehension of the Defendants was made without warrant or probable cause in violation of the Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States and the Constitution and Statutes of the State of Indiana.

B. All statements made by Defendants, if any, at the time of and subsequent to the arrest and apprehension of Defendants were the product of the illegal search and illegal arrest. (*Mapp v. Ohio*, 367 U.S. 643 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963).)

C. The search and seizure of the foregoing matter was made without probable cause and if made under the authority of a search warrant, such search warrant issued from a magistrate was without probable cause. (*Aquilar [sic] v. Texas*, 378 U.S. 108 (1964); *Spinelli v. U.S.*, 410 [sic] (1964).)

D. That information relating to the alleged basis for probable cause in the search warrant was illegally and unlawfully obtained by police and their agents and minions.

E. And for such further reasons as may appear and be urged upon hearing of this motion, if such be necessary.

WHEREFORE, Defendants pray that a date for hearing on this motion be set and, after hearing thereon, that those matters set forth in the foregoing numbered paragraphs be ordered suppressed at the trial of this cause, unless the Court grants this motion without a hearing.

/s/ Michael J. McDaniel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 15, 1979 a copy of the foregoing Motion to Suppress Evidence was served on Daniel Donahue, Prosecuting Attorney in and for this Judicial District, by hand delivery.

/s/ Michael J. McDaniel

MICHAEL J. MCDANIEL

Office-Supreme Court, U.S.
FILED
APR 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL RAY POWERS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the introduction of certain evidence during the trial of the Petitioner which was allegedly derived from an illegal interception of the telephone conversations of the Petitioner, violates the rights of the Petitioner accorded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution.

2. Whether the application of the Indiana policy of non-disclosure of the identity of an informant violates the rights of the Petitioner, accorded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution, to suppress evidence allegedly derived from illegal wiretaps.

3. Whether the decision of the Indiana Supreme Court that the alleged discovery, after trial, that evidence admitted at the trial of the Petitioner was derived from an alleged illegal interception of the telephone conversations of the Petitioner, did not warrant a new trial because probable cause for a search warrant is determined at the time of the issuance of the warrant, violates the rights of the Petitioner accorded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934 and the Fourth and Fourteenth Amendments of the United States Constitution.

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No. 82-1470

IN THE

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OCTOBER TERM, 1982

RUSSELL RAY POWERS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully requests that the Court deny the issuance of a Writ of Certiorari directed to the Supreme Court of Indiana and, thereby, refuse to review the decision entered by that Court in Cause Number 481 S 108 on October 21, 1982.

OPINION BELOW

The Indiana Supreme Court entered an opinion in this cause on October 21, 1982. The opinion is set forth in Petitioner's Appendix at A-1 and is officially reported at

440 N.E.2d 1096. A Petition for Rehearing was timely filed and was denied by the Indiana Supreme Court on January 3, 1983.

STATEMENT OF THE CASE

On March 14, 1979, Officer Donald Croft obtained a search warrant in order to search the residence of the Petitioner, Russell Powers, located at 801 East Chestnut Street in Jeffersonville, Indiana. Officer Croft was the affiant for the search warrant and his affidavit is set forth in Petitioner's Appendix at A-24. On March 15, 1979, Officers Donald Croft and Ray Leezer surveilled the residence of the Petitioner. The officers observed the Petitioner arrive at the residence, remove two dark colored satchels from a vehicle, and enter the residence. Subsequently, the officers informed the Petitioner of the search warrant. The Petitioner permitted the officers to search the residence. During the search, the officers confiscated cocaine, diazepam, barbiturates, phentermine, and marijuana. In addition, mannitol, a substance which is used to dilute cocaine, was also discovered, as well as, various sifters and other tools.

Prior to trial, the Petitioner filed a Motion to Suppress the evidence seized at his residence. The Petitioner argued that the search warrant was based on information which was illegally obtained by means of the alleged interception of his telephone conversations by Connie Hartman while she worked for a telephone answering service to which the Petitioner subscribed. During a hearing on the Motion to Suppress, Officer Croft testified that the facts in the affidavit were true, that he was unaware of any illegal interception of telephone calls, and that he never directed the informant to perform any illegal interceptions. In addition, at the hearing, the Petitioner's counsel asked Officer Croft to disclose the identity of his informant. The State, however, successfully argued that the confidentiality

of the informant had to be maintained. Subsequently, the Petitioner's Motion to Suppress was denied.

After the conclusion of the trial, a hearing was held on the Petitioner's Belated Motion to Correct Errors. At the hearing, Connie Hartman, the alleged informant, testified. Ms. Hartman told the trial court not only that she was the informant, but also that she illegally intercepted the Petitioner's telephone conversations. The Petitioner requested that the trial court grant a new trial as a result of the "newly discovered" evidence, but the trial court refused.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied since the Petitioner has failed to present federal questions with respect to his claims that certain evidence should have been suppressed at his trial, that the identity of a police informant should have been disclosed, and finally, that certain newly discovered evidence warranted a new trial.

The Petitioner, in order to attempt to raise federal questions, merely controverts rights under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution. However, the Petitioner's reliance on the federal statutes and amendments to the Constitution is misplaced because the Petitioner never proved that his telephone conversations were intercepted. The Petitioner has failed to meet the requirement of 28 U.S.C. 1257 (3) as the federal statutes and amendments were never drawn into question in a manner directly bearing on the merits of the action.

Since the judgment of the Indiana Supreme Court was based upon nonfederal grounds and the nonfederal grounds are adequate to support the judgment, the United States Supreme Court must decline to review the case.

ARGUMENT

I.

THE PETITIONER HAS FAILED TO PRESENT A FEDERAL QUESTION WITH RESPECT TO HIS CLAIM THAT CERTAIN EVIDENCE SHOULD HAVE BEEN SUPPRESSED AT HIS TRIAL

The Petitioner asserts that certain evidence introduced at trial was allegedly derived from illegal interceptions of his telephone conversations by Connie Hartman while she worked at a telephone answering service to which the Petitioner subscribed. The Petitioner argues that this information was given to Officer Croft and was used by him to determine probable cause in order to search the Petitioner's residence. Prior to trial, the Petitioner filed a Motion to Suppress wherein he argued that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 compels any court to refuse to introduce all items of evidence seized during the search.

The Indiana Supreme Court, in addressing this issue, stated that the trial court properly overruled the Motion to Suppress all evidence seized at the residence of the Petitioner since he failed to prove his contentions at the hearing on the Motion to Suppress. The Supreme Court determined that the search warrant affidavit indicates that the informant personally observed the illegal transactions at the Petitioner's residence. The informant did not receive the information through illegal interception of telephone calls. In addition, Officer Croft stated that he neither knew of any illegal interceptions, nor did he authorize any interceptions. The Supreme Court also observed that the Petitioner did not subpoena or depose Ms. Hartman prior to the hearing or the trial. The burden of showing that the information in the search warrant affidavit was the product or fruit of illegal police activity is upon the Petitioner. *Maciejack v. State*, (1980) ___ Ind. ___, 404 N.E.2d 7. The Petitioner did not sustain his burden.

Finally, no federal question has been presented in regard to the admission of the evidence seized at the Petitioner's residence. Since the Petitioner did not prove that a wiretap was committed, his arguments as to violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution are inapplicable. The Indiana Supreme Court decided the issue exclusively by means of state law and never reached the alleged federal question. It is clear that review by the United States Supreme Court is precluded as a result not only of the absence of a federal question, but also the decision of the Indiana Supreme Court rests on adequate and independent state grounds. *Herb v. Pitcairn*, (1945) 324 U.S. 117.

II.

THE PETITIONER HAS FAILED TO PRESENT A FEDERAL QUESTION WITH RESPECT TO HIS CLAIM THAT INDIANA POLICY OF NON-DISCLOSURE OF THE IDENTITY OF AN INFORMANT VIOLATES CERTAIN OF HIS FEDERAL RIGHTS

The Petitioner contends that the identity of Officer Croft's informant should have been disclosed since the identity was crucial to his challenge to the search warrant. The Petitioner argues that if the identity of the informant had been disclosed, the trial court would have been bound by the Fourth and Fourteenth Amendments to the United States Constitution and by various federal statutes, specifically, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, to suppress the evidence which resulted from the search warrant.

The Indiana Supreme Court, in addressing this issue, stated that the general policy in Indiana is to prevent

disclosure of an informant's identity unless the defense can demonstrate that disclosure is relevant, helpful, or is necessary to a fair trial. *Ryan v. State*, (1982) ___ Ind. ___, 431 N.E.2d 115. Since the State has the privilege to withhold the identity of an informer, the burden is upon a defendant who seeks disclosure to demonstrate an exception to the privilege that the informer remain anonymous. *McCray v. Illinois*, (1967) 386 U.S. 300.

The Supreme Court observed that Ms. Hartman's testimony, under oath, at the hearing on the Belated Motion to Correct Errors, was inconsistent. As a result of the inconsistencies, the Supreme Court stated that Ms. Hartman's testimony would not have been necessarily relevant and helpful in preparing the Petitioner's defense or essential to a fair determination of the case. Moreover, the Supreme Court noted that since the Petitioner strongly suspected that Ms. Hartman was the informant, he could have issued a subpoena for Ms. Hartman to testify as a defense witness at the suppression hearing or the trial. Since the Petitioner did not sustain his burden of proof, the Supreme Court held that the trial court did not err in refusing to disclose the identity of the informant.

Finally, no federal question has been presented in regard to the non-disclosure of the identity of Officer Croft's informant. Since the Petitioner did not prove that a wiretap was committed, his arguments as to the violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution are without merit. The Indiana Supreme Court decided the issue exclusively by means of state law and never considered the alleged federal question. It is clear that review by the United States Supreme Court is precluded as a result not only of the absence of a federal question, but also the decision of the Indiana Supreme court rests on adequate and independent state grounds. *Herb v. Pitcairn*, (1945) 324 U.S. 117.

III.

THE PETITIONER HAS FAILED TO PRESENT A FEDERAL QUESTION WITH RESPECT TO HIS CLAIM THAT CERTAIN NEWLY DISCOVERED EVIDENCE WARRANTED A NEW TRIAL

After the conclusion of the Petitioner's trial, a hearing was held on his Belated Motion to Correct Errors. Ms. Hartman, the alleged informant, testified at the hearing not only that she was the secret informant, but also that she illegally intercepted the Petitioner's telephone conversations. Although her testimony was inconsistent, the Petitioner considered her testimony to be "newly discovered" evidence which warranted a new trial. However, both the trial court and Indiana Supreme Court refused to grant the Petitioner a new trial. Nevertheless, the Petitioner contends that the refusal of the Indiana Supreme Court to grant a new trial is contrary to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution.

The Indiana Supreme Court, in addressing this issue, stated that to justify the granting of a new trial on the basis of newly discovered evidence, a petitioner or appellant must show: that the evidence has been discovered since the trial, that it is material and relevant, that it is not cumulative, that it is not merely impeaching, that it is not privileged or incompetent, that due diligence was used to discover it in time for trial, that the evidence is worthy of credit, that it can be produced upon a retrial of the case, and finally, that it will probably produce a different result. *Bryant v. State*, (1979) ___ Ind. ___, 385 N.E.2d 415. In addition, the grant of a new trial on the ground of newly discovered evidence is within the discretion of the trial court. *Smith v. State*, (1982) ___ Ind. ___, 429 N.E.2d 956. The Supreme Court also cited Indiana Rules of Procedure, Trial Rule 59(A)(6) which permits a new trial for newly

discovered material evidence which could not, with reasonable diligence, have been discovered and produced at trial.

In the application of state law in its consideration of this issue, the Supreme Court stated that the Petitioner failed to establish that he used due diligence to discover the evidence in time for trial. Approximately eight months elapsed from the suppression hearing until the commencement of the trial without any effort by the Petitioner to obtain testimony from Ms. Hartman, even though the Petitioner believed that she was the secret informant.

The Supreme Court also stated that assuming, *arguendo*, that Ms. Hartman spoke the truth at the hearing, that she did intercept the Petitioner's telephone conversations, the Petitioner would not be entitled to a new trial. However, if Ms. Hartman had testified at the suppression hearing and convinced the trial court of the truth of her allegations, the search warrant would have been invalid as a result of a lack of probable cause due to the illegally obtained information. The Supreme Court emphasized that the truth of her testimony at the post-conviction hearing would not render the search warrant invalid since the test for probable cause to make an arrest is whether at the time of the arrest the facts and circumstances were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee had committed or was committing an offense. *Beck v. Ohio*, (1964) 379 U.S. 89. The Supreme Court acknowledged that although the *Beck* decision dealt with probable cause for arrest, the rationale is similar for probable cause in issuing a search warrant. The Supreme Court ruled that a new trial was not required since the facts known to Officer Croft, at the time the search warrant was issued, indicated that illegal activity was occurring in the Petitioner's residence.

Finally, no federal question has been presented in regard to the Petitioner's claim that certain newly discovered

evidence warranted a new trial. Since the Petitioner failed to prove that a wiretap was committed, his arguments that the refusal of the Indiana Supreme Court to grant a new trial based on newly discovered evidence is contrary to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Federal Communications Act of 1934, and the Fourth and Fourteenth Amendments to the United States Constitution, are groundless. The Indiana Supreme Court decided the issue solely by means of state law and never examined the alleged federal question. Clearly, review by the United States Supreme Court is precluded as a result not only of the absence of a federal question, but also the decision of the Indiana Supreme Court rests on adequate and independent state grounds. *Herb v. Pitcairn*, (1945) 324 U.S. 117.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of Indiana

RUSSELL RAY POWERS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 481 S 108
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge

PIVARNIK, J.

Appellant-defendant, Russell Ray Powers, was convicted of dealing in a narcotic drug, Ind. Code §35-48-4-1 (Burns Repl. 1979), dealing in a schedule II controlled substance,

Ind. Code §35-48-4-2 (Burns Repl. 1979), and dealing in a schedule IV controlled substance, Ind. Code §35-48-4-3 (Burns Repl. 1979), at the conclusion of a jury trial in Clark Circuit Court on April 29, 1980. Appellant was given thirty (30) years imprisonment for Count I, ten (10) years imprisonment for Count II, and five (5) years imprisonment for Count III, all sentences to be served consecutively. Powers now appeals.

Appellant raises seven errors on appeal, concerning: 1) whether the search warrant was based upon illegally intercepted telephone conversations; 2) whether the trial court erred in allowing the State to retain the confidentiality of its informant; 3) whether the trial court erred, in overruling Appellant's Belated Motion to Correct Errors based on newly discovered evidence; 4) whether the search warrant was facially inadequate; 5) whether the trial court erred in admitting exhibits over Appellant's chain of custody objection; 6) whether the trial court erred in allowing a police officer to testify as to Appellant's intent to deliver drugs; and 7) whether the sentence imposed was excessive.

On March 14, 1979, a search warrant was issued authorizing the police to search for narcotics in the residence located at 801 E. Chestnut Street in Jeffersonville, Indiana. Officers Donald Croft and Ray Leezer were on surveillance at 801 E. Chestnut on March 15, 1979, when Appellant arrived at the house. Appellant was accompanied by two individuals, a man and a woman. After the three got out of the car, Appellant removed two dark colored satchels and entered the house. A few minutes later, Appellant left the house, made some purchases at a liquor store and a grocery store, and then returned to his home at 801 E. Chestnut. At that point the police informed him of the search warrant and Appellant agreed to let the police search his residence. As they approached the front door, one of the officers observed a young man grab a briefcase or bag and run through the house. The police

forced the door open and caught the young man, Terry Powers, and seated him, along with Appellant, a woman named Rhonda Spears, and a young child, on a bed while the house was searched. The search turned up cocaine, diazepam, barbiturates, phentermine, and some marijuana. In addition, mannitol, which is used to cut cocaine, was also found, along with various sifters and other tools.

I

Appellant argues that the search warrant was based on information illegally obtained through the interception of his telephone calls. He now argues that this fact makes the search and seizure of items at his home illegal and therefore the trial court should have suppressed the introduction of all evidence seized at Appellant's residence. Appellant's error 3 is related to error 1 and both errors will be handled in this issue.

Officer Donald Croft was the affiant for the search warrant and the following reasons constituted his belief that there was probable cause to search Appellant's house:

> "I am a police officer with the Jeffersonville Police Department. Approximately three months ago a person contacted me for the purposes of giving me information concerning the possession and sale of cocaine. This person or informant related to me that the person of RUSSELL POWERS who lives in the above described dwelling was a regular dealer in cocaine. *This informant further related to me that RUSSELL POWERS was observed by the informant cutting cocaine in the above described dwelling on a number of occasions and further advised me that RUSSELL POWERS was observed by the informant selling cocaine to persons who visited at the above described dwelling. This informant additionally related that RUSSELL POWERS would cut this cocaine and bag it in plastic bags using a seal-a-meal machine which seals material in plastic bags.* I advised this person, my informant, to keep me notified as to the

activity of RUSSELL POWERS. Over the last three months on at least eight occasions this informant gave me information concerning the activity of RUSSELL POWERS. This information consisted of this informant telling me that RUSSELL POWERS intended to go to a certain place and meet with a certain person for the purposes of transacting a deal in cocaine. On these occasions I and other police officers provided surveillance of RUSSELL POWERS and he did go to the places indicated by this particular informant and on several of these occasions I did observe him meeting with the person described by the informant. I was not able on these occasions to make any interceptions or determine that drug trafficking was occurring.

This informant advised me on a number of occasions that RUSSELL POWERS would go to Bowling Green, Kentucky, for the purpose of purchasing cocaine. *This informant additionally advised me that on the occasions that RUSSELL POWERS was observed cutting the cocaine that he referred to it as cocaine.*

Last evening, March 13, 1979, I was observing the above described dwelling and noted that there were six automobiles parked outside the dwelling and that these automobiles had Kentucky plates. I also observed a number of people inside the dwelling. Early this morning, March 14, 1979, I contacted my informant and inquired as to the people being at 801 E. Chestnut Street and as to the automobiles parked outside. This informant advised me that RUSSELL POWERS was present in the dwelling with a number of people who were pooling their money for the purpose of having RUSSELL POWERS purchase a large amount of cocaine. This informant related that there were conversations concerning the purchase of cocaine and this information related that money was given to RUSSELL POWERS for the purpose of his purchasing cocaine.

Following this conversation with my informant I received a telephone call from the informant later on and the informant related that RUSSELL POWERS made a statement that he was going to Bowling Green to make the connection and that he had left for the apparent purposes of traveling to Bowling Green.

This informant further related that last night cocaine was observed by the informant in the above described dwelling and that none of the persons left the dwelling last night with this cocaine. Furthermore, this informant stated that based upon past observations cocaine was always to be found in the above dwelling.

I discussed this matter further with this informant who related that following his trips to Bowling Green that RUSSELL POWERS would return to the above described dwelling taking the cocaine inside for the purposes of cutting it before delivering it or selling it to his various customers.

I asked this informant how the informant was certain that the materials RUSSELL POWERS dealt in was cocaine. *This informant related that in addition to the numerous conversations in which the word cocaine was used and in addition to seeing the white powdery substance in plastic bags that RUSSELL POWERS snorted the white powder in the informant's presence and that the white powder had some obvious effect upon him.*

I believe this informant to be a credible person who spoke with personal knowledge as to the informant's observations in that on at least eight occasions, as mentioned above, the information given to me by this informant proved to be accurate and correct.

Based upon the foregoing, I believe there is probable cause to search said dwelling for cocaine." (emphasis added)

A hearing on the suppression motion was held on August 27, 1979. Croft was questioned mainly by the defense counsel, although a few questions were asked by the State.

Under questioning, Croft testified that all of the facts in the affidavit were true to his knowledge. He stated that he did not know of any illegal interception of phone calls and that he never directed the informant to make any illegal interceptions. Defense counsel asked Croft who the informant was but the State successfully objected, arguing that the confidentiality of the informant must be maintained. A few notes that Croft wrote down were introduced at which time he was asked to explain the term "calls often." Croft replied that the information he wrote down on that note pad came from another informant but he assumed that "calls often" meant telephone calls. At the end of the hearing defense counsel made an offer to prove that Connie Hartman was the informant. The trial court reserved judgment on the motion until both sides had an opportunity to submit briefs in support of their positions. The Motion to Suppress was denied on December 7, 1980.

Appellant cites us to 18 U.S.C. §2515 (1970) which provides as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Appellant argues that Connie Hartman listened in on his private telephone calls while she worked for a telephone answering service to which Appellant subscribed. This information was passed on to Officer Croft and was used by him to determine the probable cause for searching Appellant's house. Therefore, Appellant states that §2515 compels any court to refuse the introduction into evidence of all items seized during the search.

We feel that Appellant failed to prove this contention at the hearing on the motion to suppress. The underlined portions of the search warrant affidavit indicates that the informant personally observed the illegal transactions at Appellant's residence and did not receive that information through illegal interception of telephone calls. It may be possible that the information concerning the eight occasions when the informant knew where Appellant was going and who he was meeting was obtained by listening in on telephone calls but this speculation was apparently insufficient to convince the trial court of any illegality. Officer Croft stated that he did not know of any illegal interceptions nor did he authorize any interceptions. While Appellant made an offer to prove that Connie Hartman was the informant, he never introduced her at the hearing. Appellant apparently made no effort to subpoena Hartman or depose her prior to the hearing or the trial. In fact, during the hearing on the Belated Motion to Correct Errors, Hartman stated that she was never approached prior to or during the trial by Appellant or anyone else. The burden of showing that the information in the search warrant affidavit was the product or fruit of illegal police activity lay with Appellant. *See Maciejack v. State*, (1980) ___ Ind. ___, 404 N.E.2d 7. From the evidence presented at the hearing, the trial court properly overruled the motion to suppress all evidence seized at Appellant's house.

After the trial was concluded and Appellant was convicted and sentenced to prison, a hearing on Appellant's Belated Motion to Correct Errors was held on August 21, 1980. Connie Hartman, the alleged informant, was the only witness to testify at the hearing. Basically, Hartman told the trial court that she was the secret informant, that she did illegally intercept Appellant's telephone conversations, and that Officer Croft told her he would make up statements in the affidavit of the search warrant in order to protect her identity. Her testimony was not without some discrepancies but Appellant urges us to consider this

"newly discovered" evidence and to hold that the trial court erred in refusing to grant a new trial. We disagree.

We held in *Bryant v. State*, (1979) ___ Ind. ___, ___, 385 N.E.2d 415, 421:

> "To justify the granting of a new trial on the basis of newly discovered evidence, the petitioner or appellant must show:
>
> > '. . .(1) that the evidence has been discovered since the trial; (2) that it is material and relevant; (3) that it is not cumulative; (4) that it is not merely impeaching; (5) that it is not privileged or incompetent; (6) that due diligence was used to discover it in time for trial; (7) that the evidence is worthy of credit; (8) that it can be produced upon a retrial of the case; and (9) that it will probably produce a different result.' *Tungate v. State*, (1958) 238 Ind. 48, 54-55, 147 N.E.2d 232, 235-36. *See e.g. Clark v. State*, Ind., 378 N.E.2d 850; *Jackson v. State*, (1975) 264 Ind. 54, 339 N.E.2d 557; and *Emerson v. State*, (1972) 259 Ind. 399, 287 N.E.2d 867."

Granting a new trial on ground of newly discovered evidence is within the discretion of the trial court and this Court will not disturb the ruling unless there is an abuse of discretion. *Smith v. State*, (1982) ___ Ind. ___, 429 N.E.2d 956; *Washington v. State*, (1979) ___ Ind. ___, 390 N.E.2d 983.

Without examining all of the nine *Tungate* requisites, it is obvious that Appellant has failed the sixth requirement, that of showing the use of due diligence to discover the evidence in time for trial. Ind. R. Tr. P. 59(A)(6) permits a new trial for "[n]ewly discovered material evidence which could not, with reasonable diligence have been discovered and produced at the trial." Therefore, under *Tungate* and Rule 59(A)(6) a new trial may be denied where the appellant cannot show that even with reasonable diligence the new evidence could not be produced at trial. The record

reveals that Appellant was arrested on March 15, 1979. At the suppression hearing on August 27, Appellant made an offer to prove that Connie Hartman was the confidential informant. On April 22, 1980, Appellant's trial began and was concluded on April 29 when the jury returned verdicts of guilty. Connie Hartman testified at the hearing on Belated Motion to Correct Errors that prior to Appellant's trial and during the trial neither Appellant nor defense counsel approached her in any manner to question her about her role as the informant. Thus, nearly eight months passed from the suppression hearing to the start of the trial without any effort by Appellant to secure testimony from Connie Hartman, even though Appellant alleged that she was the secret informant and that she had been involved in illegal activity. There was no abuse of discretion in denying a new trial.

Assuming, *arguendo*, that Connie Hartman was telling the truth at the post-conviction hearing, that she did indeed intercept Appellant's telephone calls, we fail to see how this would result in a new trial. The timing of her testimony is crucial here. If Hartman had testified at the suppression hearing and at that point convinced the trial court of her allegations, the search warrant would have been invalid due to the illegal information contained therein. The removal of the illegally obtained information would have eliminated the probable cause in the search warrant and the evidence seized would have been suppressed. The truth and veracity of her testimony at the *post-conviction* hearing, however, would not travel back and render the search warrant invalid:

> "As this Court stated in *Smith v. State*, (1971) 256 Ind. 603, 271 N.E.2d 133, 136:
>
> 'The test for probable cause to make an arrest is whether *at the time of the arrest* the facts and circumstances . . . were sufficient to warrant a prudent man of reasonable caution in believing that the arrestee had committed or was committing an offense.

Beck v. Ohio, (1964) 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142.'

Emphasis added. *See Gaddis v. State*, (1977) 267 Ind. 100, 368 N.E.2d 244. Thus, whether probable cause existed for the arrest is determined by examining the facts and circumstances as they were known to be at the time of the arrest."

Riggenbach v. State, (1979) ___ Ind. ___, ___, 397 N.E.2d 953, 954-55.

Although the above cited case dealt with probable cause for arrest, we feel the rationale is similar for probable cause in issuing a search warrant. The facts known to Officer Croft at the time the search warrant was issued indicated that illegal activity was taking place in Appellant's house. That some of the underlying circumstances may be shown later after trial to be illegally obtained does not change the fact that probable cause existed for the search and subsequent arrest. No error has been shown.

II

Appellant claims that the trial court erred in refusing to disclose the identity of Officer Croft's informant. He feels that her identity was crucial to the attack on the search warrant for the suppression of evidence as noted above in Issue I. Appellant argues that had the informant's identity been disclosed, the trial court would have been bound by federal statutes to suppress the evidence resulting from the search warrant.

The general policy in Indiana is to prevent disclosure of an informant's identity unless the defense can demonstrate that disclosure is relevant and helpful or is necessary to a fair trial. *Ryan v. State*, (1982) ___ Ind. ___, 431 N.E.2d 115; *Lewandowski v. State*, (1979) ___ Ind. ___, 389 N.E.2d 706. Since the State has the privilege to withhold the identity of an informer, the burden is upon the

defendant seeking disclosure to demonstrate exception to the privilege that the informer remain anonymous. *Lewandowski, supra.*

The informant was never called as a witness at trial. The only involvement of the informant was the information given to the police which formed part of the basis for the search warrant. Appellant's argument presupposes that Connie Hartman would have testified that her information was obtained through illegal eavesdropping. As was indicated above, relevant portions of the affidavit concerning the cocaine indicated that the information was obtained through person observation. In addition, Connie Hartman's testimony under oath at the hearing was full of inconsistencies. For example, at one point Hartman stated she saw cocaine in Appellant's residence on only one occasion but later she stated she saw cocaine on more than one occasion. Another time Hartman stated she gave Croft information that Appellant was going to meet someone on only one instance. She was later asked how many times she reported to Croft that Appellant was going to meet someone at a certain place and her answer was that it probably would have been more than three or four times. Still later, Hartman said she never reported him leaving to meet someone at a certain location but said only that he was going out of town to a certain place. It does not necessarily appear that Hartman's testimony would have been relevant and helpful in preparing Appellant's defense nor essential to a fair determination of the case. Appellant has failed to meet his burden of demonstrating the need for disclosure.

Furthermore, the defense strongly suspected Hartman was the informant. Had the Appellant wished to pursue this theory, he could have issued a subpoena for Hartman as a defense witness at the suppression hearing or the trial. At the very least, he could have deposed her and any arguable infirmities in the affidavit could have been presented to the trial court. There is no error here.

III

Appellant claims that the search warrant was facially inadequate to meet statutory and case law requirements. Specifically, Appellant states that the affidavit failed to state sufficient facts upon which a judicial officer could determine that the confidential informant was reliable.

The statutory requirements for such affidavits are set forth in Ind. Code §35-1-6-2(a) (Burns Repl. 1979) which provides as follows:

> "Affidavit—Contents and form—Sworn testimony in lieu of or in addition to affidavit.—(a) Except as provided in subsection (c) of this section, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed said offense, and setting forth the facts then in knowledge of the affiant or information based on credible hearsay, constituting the probable cause. When based on hearsay, the affidavit shall contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished."

In *McClain v. State*, (1980) ___ Ind. ___, ___, 410 N.E.2d 1297, 1301-02, we discussed the factors that must be met before a search warrant may be issued by a magistrate:

> "Under the Fourth Amendment a determination of probable cause is required to be made by a judge before a search warrant may be issued. Such a determination may be made upon affidavit or sworn oral statement. To be sufficient the affidavit or testimony must provide a substantial basis for the judge to find that probable cause exists to believe that

the proposed search will result in a discovery of evidence of an offense. *Aguilar v. Texas*, (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723. In making this finding inferences may be drawn by the judge from the facts stated. *Giordenello v. United States*, (1958) 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503. If the basis, be it affidavit or actual testimony, does not provide a sufficient basis for the finding of probable cause, the evidence obtained through the warrant is inadmissible at appellant's trial. *Aguilar, supra. Riddle v. State*, (1971) 257 Ind. 501, 275 N.E.2d 788; *Callender v. State*, (1922) 193 Ind. 91, 138 N.E. 817.

An affidavit for search warrant may be sufficient although it is based upon hearsay, i.e., the maker may include information provided by others of which he has no first-hand knowledge so long as the issuing authority is provided the following information:

> '(a) Affirmative allegations that the credible person spoke with personal knowledge of the matters contained therein.
>
> (b) The facts within the personal knowledge of the credible person.
>
> (c) The facts within the affiant's knowledge as to the credibility of the credible person.' *Madden v. State*, (1975) 263 Ind. 223, 226, 328 N.E.2d 727."

The affidavit is found in Issue I. There, Officer Croft related that the informant spoke with personal knowledge from having viewed cocaine in the residence the previous night and from having observed Appellant selling cocaine there on other occasions. The informant also saw Appellant cutting cocaine and sealing it in plastic bags. At these times, Appellant referred to the white substance as cocaine and snorted it in the informant's presence. This personal and first-hand knowledge satisfies the first two requirements of *Madden, supra.*

The remaining need is to determine whether the third requirement of *Madden* is met. Croft stated that on eight

prior occasions the informant told him that Appellant would go to certain places and meet with certain people. The police put a surveillance on Appellant and found that he did go to the places indicated and did meet with the people described by the informant. The affiant was unable to determine if illegal activity was taking place at these meetings but nevertheless, the information was accurate and correct. Croft stated at the end of the affidavit: "I believe this informant to be a credible person who spoke with personal knowledge as to the informant's observations in that on at least eight occasions, as mentioned above, the information given to me by this informant proved to be accurate and correct."

It is well established that a statement in an affidavit declaring that the informant has previously supplied valid information is sufficient to satisfy the statutory requirement of facts as to the credibility of the informant. *Tinnin v. State*, (1981) ___ Ind. ___, 416 N.E.2d 116; *Foxall v. State*, (1973) 157 Ind.App. 19, 298 N.E.2d 470. Appellant argues that this information establishing the credibility of the informant is analogous to the "tip" in *Bowles v. State*, (1971) 256 Ind. 27, 267 N.E.2d 56, where we held that the tip alone was insufficient to establish the necessary credibility. We held as such because the tip in *Bowles* was not supported by either history of reliability of source or extrinsic facts either from the informer or other proper sources. In this cause there were at least eight occasions where the informant provided the police with accurate information. Thus, the statement that the informant had previously provided valid information was sufficient. There has been no error shown here.

IV

When the cocaine and other drugs were removed from Appellant's home, they were taken to the Jeffersonville Police Department's property room and Officers Roberts and Croft bagged and marked the items that night. When

the officers were finished the next morning, the items were placed in a safe to which only the Chief of Police and his assistant had the combination. Four days later, March 20, 1979, the Chief of Police opened the safe with Roberts and Croft present, and all the evidence was intact. Croft and Roberts took the items to the Indiana State Police Laboratory where the items were handed over to chemist George Smith. After running five different tests, Smith found cocaine in each of the samples. He sealed the items in a plastic bag and handed it over to the police on March 28. Since it was late in the evening and the Chief of Police was not around, the evidence bag was placed in a lock-up cabinet and the next morning was transferred to the safe. At that time the evidence bag was still sealed at the top. On the Friday prior to the trial, Exhibit 11 was missing seventeen bags of cocaine and Exhibit 17, which originally contained one large bag and six small packets, was missing four of the small packets. Appellant objected to the admission of all exhibits, claiming there was an insufficient chain of custody shown.

Appellant specifically argues that the missing evidence indicates that other people had the combination to the safe and therefore all of the exhibits could have been tampered with before they were moved to the laboratory for examination. We disagree. Appellant objected on chain of custody grounds but we held in *Graham v. State*, (1970) 253 Ind. 525, 255 N.E.2d 652, that the State can introduce the laboratory's findings upon producing records or testimony showing the "continuous whereabouts of the exhibit at least between the time it came into their possession until it was laboratory tested to determine its composition." *Id.* at 531, 255 N.E.2d at 655. A proper chain of custody was shown at the trial. As for Appellant's other contention, nothing in the record indicates that the exhibits were tampered with prior to testing and this Court will not speculate about such events upon review. There is no error here.

V

During the trial Officer Croft testified about the amount of narcotics that were found in the Appellant's house. Over objection by defense counsel, Croft stated that in his opinion the drugs were possessed for delivery and not for personal use. Appellant argues that the witness' opinion of intent is inadmissible because whether or not Appellant intended to deal in narcotics was a determination that the jury must make.

The old rule that a witness may not give an opinion of an ultimate fact question has been abrogated in Indiana. *Shelby v. State*, (1981) ___ Ind. ___, ___, 428 N.E.2d 1241, 1243; *Woods v. State*, (1978) 267 Ind. 581, 582, 372 N.E.2d 178, 178. The trial court in its discretion may permit such opinion evidence in an appropriate case; accordingly, this Court will reverse such an exercise of discretion only upon a showing of abuse. *Id.* Witnesses have given opinions on whether a person is intoxicated, *Wofford v. State*, (1979) ___ Ind. ___, 394 N.E.2d 100, whether the defendant made true statements to the police, *Porter v. State*, (1979) ___ Ind. ___, 391 N.E.2d 801, whether the defendant appreciated the wrongfulness of his conduct, *Bobbitt v. State*, (1977) 266 Ind. 164, 361 N.E. 2d 1193, and whether a child had been abused, *Ball v. State*, (1980) ___ Ind.App. ___, 406 N.E.2d 305.

We do not find reversible error here. As the prosecution stated in response to defense counsel's objection, Officer Croft had investigated numerous drug cases and therefore he had enough experience to give an opinion on whether or not the drugs were held for sale or for personal use. The large amount of drugs found in the house, plus the sifters and other tools, indicated that the drugs would be prepared for sale. The jury would then weigh Officer Croft's opinion before ultimately deciding the question. There was no abuse of discretion in allowing the testimony of Officer Croft.

VI

Appellant was convicted of three counts of dealing in controlled substances. Count I was a Class A felony and Appellant was given the presumptive penalty of thirty years in prison. Count II was a Class B felony and Appellant was given the presumptive penalty for that offense, ten years in prison. Count III was a Class C felony and Appellant was given the presumptive penalty of five years in prison. The trial court ordered the three sentences to be served consecutively. Appellant argues on appeal that the forty-five year prison term is excessive and unreasonable.

Our applicable rule covering appellate review of sentences states that this Court will not "revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender." Ind. R. App. Rev. Sen. 2(1). This Court has also held that when the trial court increases or decreases the sentence imposed by law, or orders the sentences to be served consecutively, the record should disclose the factors considered by the trial court to constitute aggravating or mitigating circumstances. *Gardner v. State*, (1979) ___ Ind. ___, ___, 388 N.E.2d 513, 517.

The trial judge, however, ordered that the sentences be served consecutively while also stating that he found no aggravating or mitigating circumstances which would "out-weigh imposition of the normal sentence." The imposition of consecutive sentences conflicts with the mandate of *Gardner* and thereby constitutes error in sentencing. Therefore, we remand this cause to the trial court with instructions to impose concurrent, not consecutive sentences.

This cause remanded to the trial court with instructions

to amend the sentencing; in all others respects, the judgment of the trial court is affirmed.

Givan, C.J., DeBruler, and Hunter, JJ., concur.
Prentice, J., concurs in result with separate opinion.

IN THE

Supreme Court of Indiana

RUSSELL RAY POWERS,	)	
	)	
Appellant (Defendant Below)	)	
	)	
v.	)	No. 481 S 108
	)	
STATE OF INDIANA,	)	
	)	
Appellee (Plaintiff Below)	)	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Richard G. Striegel, Special Judge

PRENTICE, J.—Concurring in Result

I am unable to join the majority opinion upon Issue V.

As characterized by the majority, Officer Croft related his opinion that Defendant possessed the contraband recovered for purposes of selling or delivering it. From his entire testimony, I conclude that he was testifying hypothetically. Croft was asked, "***, do you have an opinion as to whether or not these drugs were sold or were possessed solely for personal possession or whether they were possessed for delivery or sale?", whereupon Defendant's objection was argued and overruled. Croft then testified as follows:

> "Q. In your opinion were these, was this amount of drugs possessed for personal use or for delivery to others?
>
> "A. It was possessed for sale.

"Q. I also direct you to State's Exhibits #4, which has previously been identified as drugs containing amobarbital and secobarbital, based upon your experience would this amount of drugs be possessed for personal use or for delivery to others?

"A. For sale, for delivery.

"Q. State's Exhibit #5 and State's Exhibit #15, based upon the amount, these have previously been described as valium tablets containing diazpam, based upon your experience and knowledge would this amount of drugs be held for personal use or for delivery or sale?

"A. Delivery and sale on those."

I do not comprehend the State's questions, as a whole, as inviting the Officer's opinion about whether Defendant entertained the requisite intent to sell, an ultimate fact in this case, although the first question could be so interpreted. Prior to his giving the testimony at issue, the State attempted to qualify Croft as an expert on the investigation of narcotics cases and, in so doing, disclosed the extent of his training and knowledge about controlled substances, particularly cocaine. Having educated the jury as to his expertise, the State then sought to convey an "expert's" opinion upon whether, in general, one would possess a quantity of contraband, such as that recovered, for sale. *See Thompson v. State*, (1980) Ind. App., 400 N.E. 2d 1151, 1153.

If the record revealed what the majority claims it reveals, it would show a clear abuse of discretion. In *Simpson v. State*, (1978) 269 Ind. 495, 502, 381 N.E. 2d 1229, 1233, we stated:

"It appears from the record that the psychologist in question would have testified that appellant lacked the requisite intent because of his great fear of Ben Rodriguez. The question of a person's intent at the time of the commission of a crime, not related to an issue of insanity, is a question of fact for the jury and

not a proper subject of expertise. The psychologist's testimony in this regard would have been nothing more than hearsay and was not necessary as an aid for the jury's determination of the issue of the presence or absence of criminal intent."

The State devotes a considerable portion of its argument to convincing us that Croft was qualified as an expert; however, it does not treat the issue of whether an expert's testimony was necessary in order to arrive at the opinion that Croft expressed. Even if qualified as an expert on narcotics investigations, Croft was no more capable than were the jurors themselves to infer Defendant's intent to sell from the single circumstance of possession of a large quantity of contraband.

> "As a general rule, the opinion of experts is not received 'if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding." (citation omitted)."
>
> *Keifer v. State*, (1927) 199 Ind. 10, 14, 154 N.E. 870, 871.

To allow Croft to relate the opinion that the majority claims he related, would invade the province of the jury. *See Reburn v. State*, (1981) Ind., 421 N.E. 2d 604, 606 (defense psychologist may not offer an opinion about whether the facts are consistent with an accidental shooting); *Ashbaugh v. State*, (1980) Ind., 400 N.E. 2d 767, 773 (defense psychiatrists are not qualified to offer an opinion upon the issue of self defense); *LeFlore v. State*, (1972) 258 Ind. 458, 462, 281 N.E. 2d 876, 878 (police officer, even if qualified as an expert, may not give an opinion about whether fingerprints are the best evidence that a person held an object); *Green v. State*, (1900) 154 Ind. 655, 57 N.E. 637, 640 (opinion about the quantity and quality of moonlight at the scene of a Murder is not a subject for expert testimony). *See also Matter of Perrello*, (1979) Ind., 386 N.E. 2d 174, 179 (testimony by experts concerning what constitutes the

practice of law held properly excluded as invading the province of the trier of fact).

The majority either overlooks or ignores the clear impact of the above cited cases by resorting to an over-simplified premise. These cases demonstrate that the old rule that a witness may not give an opinion upon an ultimate fact question has not been completely abrogated in Indiana. A witness still may not offer an opinion, expert or otherwise, upon an ultimate issue of fact, where the witness is in no better position than the jury to draw the inferences. That is to say that when the evidence, upon which the witness formed his opinion, is available to the jury, its position is equal of that of the witness and its opinion should be formed from the evidence free of the taint of the witness' opinion.

In a case where an ultimate issue of fact is the defendant's intent to achieve a specific unlawful result, such as the sale of a large quantity of narcotics in his possession, the circumstance of that possession does not change between the time the police officer recovers the narcotics and the time of the trial. The same cannot be said of the cases cited by the majority. The symptoms of intoxication usually disappear entirely before trial. *Wofford v. State*, (1979) Ind., 394 N.E. 2d 100, 104. The bruises and injuries of an abused child may heal before trial. *Ball v. State*, (1980) Ind., 406 N.E. 2d 305, 310. The jurors are not present during the interrogation of the Defendant; consequently, they cannot view his demeanor and other behavior reflecting upon the credibility of a confession for themselves. *Porter v. State*, (1979) Ind., 391 N.E. 2d 801, 811. Likewise, they cannot view a defendant's conduct and behavior at the time of the alleged criminal act as it may bear upon his plea of insanity. *Washington v. State*, (1979) Ind., 390 N.E. 2d 983, 988; *Bobbitt v. State*, (1977) 266 Ind. 164, 170-71, 361 N.E. 2d 1193, 1197. In sharp contrast, the jurors could weigh the fixed circumstance, in this case the quantity of narcotics recovered, and, without the aid of the opinions from others, arrive at a conclusion of their own as the Defendant's intent to deliver or to sell.

The majority's opinion upon this issue adds a mischievous and potent weapon to the State's arsenal. The testimony of a police officer, qualified as an expert, will no doubt, be given great weight. Additionally, if an experienced narcotics investigator may opine, under oath, about a Defendant's intent to sell narcotics, should we not also allow a member of the vice squad to testify that, in his opinion, an accused knew that something he possessed was obscene, or a member of the homicide squad to testify that, in his opinion, an accused intended to commit Murder? Our jurisprudence has wisely made the determination of such issues the exclusive province of the trier of fact. *See Simpson v. State, supra.*

Nevertheless, under the circumstances of this case, I cannot find reversible error in the trial court's refusal to exclude Croft's testimony. The record contains additional substantial evidence of an intent to sell and of a thriving business. The quantity of contraband seized was quite large. The police found a gun, a clip of ammunition, a sieve, and a grinder in the black satchel, which contained some of the recovered contraband. During the search of Defendant's home the telephone rang numerous times. A police officer answered only three of the calls. During one call, the caller requested Defendant by name and inquired if Defendant had the "stuff". At the police station, while being booked, Defendant made a very inculpatory admission:

> "A. After Detective Leezer asked him with the kind of job he had it was hard to believe he was into dealing drugs, he said, 'I started to get out of the coke business about a month ago.' He said, 'I wish now that I had.'"

From this evidence I conclude that the admission of Croft's testimony was error, but harmless. Consequently, I vote to affirm the judgment.

AFFIDAVIT OF OFFICER DONALD CROFT

"I am a police officer with the Jeffersonville Police Department. Approximately three months ago a person contacted me for the purposes of giving me information concerning the possession and sale of cocaine. This person or informant related to me that the person of RUSSELL POWERS who lives in the above described dwelling was a regular dealer in cocaine. This informant further related to me that RUSSELL POWERS was observed by the informant cutting cocaine in the above described dwelling on a number of occasions and further advised me that RUSSELL POWERS was observed by the informant selling cocaine to persons who visited at the above described dwelling. This informant additionally related that RUSSELL POWERS would cut this cocaine and bag it in plastic bags using a seal-a-meal machine which seals material in plastic bags. I advised this person, my informant, to keep me notified as to the activity of RUSSELL POWERS. Over the last three months on at least eight occasions this informant gave me information concerning the activity of RUSSELL POWERS. This information consisted of this informant telling me that RUSSELL POWERS intended to go to a certain place and meet with a certain person for the purposes of transacting a deal in cocaine. On these occasions I and other police officers provided surveillance of RUSSELL POWERS and he did go to the places indicated by this particular informant and on several of these occasions I did observe him meeting with the person described by the informant. I was not able on these occasions to make any interceptions or determine that drug trafficking was occurring.

This informant advised me on a number of occasions that RUSSELL POWERS would go to Bowling Green, Kentucky, for the purpose of purchasing cocaine. This informant additionally advised me that on the occasions that RUSSELL POWERS was observed cutting the cocaine that he referred to it as cocaine.

Last evening, March 13, 1979, I was observing the above described dwelling and noted that there were six automobiles parked outside the dwelling and that these automobiles had Kentucky plates. I also observed a number of people inside the dwelling. Early this morning, March 14, 1979, I contacted my informant and inquired as to the people being at 801 E. Chestnut Street and as to the automobiles parked outside. This informant advised me that RUSSELL POWERS was present in the dwelling with a number of people who were pooling their money for the purpose of having RUSSELL POWERS purchase a large amount of cocaine. This informant related that there were conversations concerning the purchase of cocaine and this information related that money was given to RUSSELL POWERS for the purpose of his purchasing cocaine.

Following this conversation with my informant I received a telephone call from the informant later on and the informant related that RUSSELL POWERS made a statement that he was going to Bowling Green to make the connection and that he had left for the apparent purposes of traveling to Bowling Green.

This informant further related that last night cocaine was observed by the informant in the above described dwelling and that none of the persons left the dwelling last night with this cocaine. Furthermore, this informant stated that based upon past observations cocaine was always to be found in the above dwelling.

I discussed this matter further with this informant who related that following his trips to Bowling Green that RUSSELL POWERS would return to the above described dwelling taking the cocaine inside for the purposes of cutting it before delivering it or selling it to his various customers.

I asked this informant how the informant was certain that the materials RUSSELL POWERS dealt in was cocaine. This informant related that in addition

to the numerous conversations in which the word cocaine was used and in addition to seeing the white powdery substance in plastic bags that RUSSELL POWERS snorted the white powder in the informant's presence and that the white powder had some obvious effect upon him.

I believe this informant to be a credible person who spoke with personal knowledge as to the informant's observations in that on at least eight occasions, as mentioned above, the information given to me by this informant proved to be accurate and correct.

Based upon the foregoing, I believe there is probable cause to search said dwelling for cocaine."